

(22,052)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 221.

FRANK H. WASKEY, PETITIONER,

vs.

J. J. CHAMBERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

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TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1595.

ANDREW EADIE, J. POTTER WHITTREN and F. H. WASKEY,
Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

1 United States Circuit Court of Appeals for the Ninth Circuit.

ANDREW EADIE, J. POTTER WHITTREN and F. H. WASKEY,
Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

Order Enlarging Time for Filing Transcript and Docketing Cause.

Good cause appearing therefor, it is hereby ordered that the time for the plaintiffs in error to file transcript of the record and docket of the above-entitled cause in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, enlarged ninety days from and after January 18th, 1908, being the return day of the citation.

Signed at Nome, Alaska, this 17th day of January, 1908, by the undersigned Judge, who signed the citation in the above-entitled cause.

ALFRED S. MOORE, *Judge.*

[Endorsed:] No. 1595. United States Circuit Court of Appeals for the Ninth Circuit. Andrew Eadie, J. Potter Whittren, and F. H. Waskey, Plaintiffs in Error, vs. J. J. Chambers, Defendant in Error. Order Enlarging Time for Filing Transcript and Docketing Cause. Filed Mar. 16, 1908. F. D. Monekton, Clerk.

2 Re-filed Apr. 16, 1908. F. D. Monekton, Clerk.

[Names and Addresses of Attorneys of Record.]

C. D. Murane, Nome, Alaska; W. A. Gilmore, Nome, Alaska, Attorneys for Plaintiff.

F. E. Fuller, Nome, Alaska; O. D. Cochran, Nome, Alaska; Ira D. Orton, Nome, Alaska; Albert Fink, Nome, Alaska, Attorneys for Defendants.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, FRANK H. WASKEY,
Defendants.

Complaint.

Plaintiff complains of defendants and for cause of suit alleges:

I.

That at all times and dates herein mentioned, plaintiff was, and is, the owner in fee as against every person except the Government of the United States, of an undivided one-half of that certain placer mining claim, named and known as the Bon Voyage, which
3 contains about twenty (20) acres of placer mining ground, and is situated about fifteen hundred (1,500) feet in a southerly direction from Creek Claim No. 3, Newton Gulch, in the Cape Nome Recording District, District of Alaska. Plaintiff is such owner by reason of a location thereof by the defendant J. Potter Whittren, in Jan. of the year, 1902, and by mesne conveyances from said defendant Whittren to this plaintiff, subsequent to said last mentioned date.

II.

That the defendant Andrew Eadie now is, and has been at all times and dates hereinafter mentioned, a tenant in common with plaintiff, having owned an undivided interest in said Bon Voyage claim above described.

III.

That defendant Frank H. Waskey was, and has been at all times hereinafter mentioned, the lessee of the defendant, Andrew Eadie, of said mining property.

IV.

That in the year 1906, defendants J. Potter Whittren and Andrew Eadie assuming and pretending to be the owners of all of said claim gave a pretended lease on all of the following described portion of said claim, to wit:

Commencing at the southwest corner of the Bon Voyage placer mining claim, thence northerly along the westerly boundary line of said claim, 1,320 feet to the northwest corner thereof, thence
easterly along the northerly boundary line of said claim 220
4 feet, thence southerly 1,320 feet to the southerly boundary line of said mining claim, thence westerly 220 feet to the point or place of beginning, to the defendant Frank H. Waskey, which lease purports to have been executed on the 11th day of June,

1906, and in which said lease defendant Waskey covenants to pay to the defendants Whittren and Eadie thirty-five (35%) per cent of the gross amount of gold to be extracted from said claim for a period of two years from date. That by another instrument purported to have been executed on the 20th day of June, 1906, the defendants Whittren and Eadie pretended to lease to the defendants Waskey and Eadie all the remainder of said claim not mentioned and described in said first lease, all of which was done without any authority from this plaintiff, and plaintiff never participated in said lease, and never consented to the same or acquiesced therein, or had anything to do with the same.

V.

That ever since the — day of June, 1906, the defendants have been, and still are, working, mining and extracting gold and gold-dust from said claim, with a large force of men and mining machinery, and have, as plaintiff is informed and believes, taken out and appropriated from said ground the sum of two hundred and fifty thousand (250,000) dollars worth of gold and gold-dust, over and above all the expenses of working and mining said claim, and have appropriated the same to their own use, and have failed, neglected and refused, and still fail, neglect and refuse to account to plaintiff for his share thereof, although demand was made
5 long prior to the commencement of this suit, upon said defendants, that they account to plaintiff for the gold extracted from said claim.

VI.

That plaintiff has no means of knowing or proving the exact amount of gold extracted, and the number of men employed or the expense of mining operations, except by resort to the conscience of the defendants.

VII.

That the defendants, at all times, had full knowledge of plaintiff's right and title to said claim, and that he was and is entitled to one-half of the gold extracted therefrom, yet defendants are sluicing from the ground on said claim every day and converting the same into money and appropriating the same to their own use, and have excluded plaintiff from said claim.

VIII.

That defendant Waskey has left the District of Alaska, and plaintiff is informed and believes that defendant Whittren intends to leave y the District of Alaska in a few days, and will take with him a large quantity of the gold extracted from said claim, thereby placing the same beyond the jurisdiction of this court.

IX.

That said claim is only valuable for the gold contained therein

and the defendants Whittren and Eadie are insolvent and plaintiff has no adequate remedy at law.

Wherefore plaintiff prays that an injunction may issue from this Honorable Court against said defendants, enjoining and
6 restraining them, and each of them, from extracting gold or gold-dust from said claim until such time as an accounting can be had, and from converting the gold and gold-dust heretofore extracted from said claim, by them, or either of them, into money, and from taking said gold or gold-dust, out of the jurisdiction of this Court, or otherwise disposing of the same.

That they be required to account to plaintiff for all gold and gold-dust extracted from said claim by them, or any of them. That a discovery and an accounting may be had, and that the books kept by the defendants, showing all transactions with reference to said claim, may be produced for plaintiff's inspection.

That when plaintiff's share shall have been determined he may have judgment against the defendants, and each of them, for such sum as may be found to be due him, upon said accounting, and the plaintiff have and recover judgment for his costs and disbursements herein, and for such other and further relief as to the Court may seem meet and agreeable to equity.

C. D. MURANE,
Attorney for Plaintiff.

UNITED STATES OF AMERICA,
District of Alaska, ss:

I, J. J. Chambers, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action, and that the foregoing complaint is true as I verily believe.

J. J. CHAMBERS.

7 Subscribed and sworn to before me this 8th day of Oct.,
1906.

[NOTARIAL SEAL.]

C. D. MURANE,
Notary Public for the District of Alaska.

[Endorsed:] No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants. Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 8, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. C. D. Murane, Attorney — Plaintiff.

In the District Court for the District of Alaska, Second Division.

#1629.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, FRANK H. WASKEY,
Defendants.

Summons.

The President of the United of America to Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants, Greeting:

You are hereby summoned and required to appear and answer the complaint of plaintiff on file in the office of the clerk of said Court at the city of Nome, in said District, within thirty (30) 8 days from the service of this summons upon you or judgment for want thereof will be taken against you, and

You are hereby notified that if you fail to appear and answer said complaint, the plaintiff will apply to the Court for the relief demanded in said complaint.

Witness the Honorable Alfred S. Moore, Judge of said Court, and the Seal of said Court affixed this 8th day of October, in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirtieth.

[SEAL OF COURT.]

JNO. H. DUNN,
Clerk of District Court.

UNITED STATES OF AMERICA,
District of Alaska, Second Division, ss:

I hereby certify that I received the annexed summons on the 8th day of October, 1906, and thereafter on the same date I served the same at Nome, Alaska, upon Frank H. Waskey, by serving J. M. Crabtree as agent, Andrew Eadie and J. Potter Whittren, by delivering to and leaving with each of them a copy thereof, together with a certified copy of the complaint filed therein.

Returned this 8th day of October, 1906.

THOMAS CADER POWELL,
United States Marshal,
By D. J. WYNKOOP, Deputy.

Marshal's Costs: 3 Services, \$18.00.

9 [Endorsed:] No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants. Summons. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 9, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. C. D. Murane, Attorney — Plaintiff. 2222.

[*Separate Answer of J. Potter Whittren to Complaint.*]

In the U. S. District Court, District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, FRANK H. WASKEY,
Defendants.

Answer.

Comes now the defendant, J. Potter Whittren, and for his separate answer to the Plaintiff's complaint herein denies each and every allegation in the said complaint contained, except only, this defendant admits that on the first day of January 1902, he duly located the said Bon Voyage Placer Mining Claim; and that the defendant Andrew Eadie is, and has been since the — day of —, 1904, the owner of an undivided one-half part thereof; and that the defendants executed the lease and agreement mentioned in paragraph four of the
10 said complaint; and that the defendant Frank H. Waskey, immediately after the date of the said lease, entered into the possession of the premises therein described, and began working and mining the same; and that the defendants Andrew Eadie and Frank H. Waskey, immediately after the execution of the said agreement, entered into the possession of the premises therein described, and commenced to work and mine the same; and that they are now in the possession and occupancy of the said premises and working and mining the same, under the said lease and agreement respectively; and this defendant also admits that the defendant Waskey has left the District of Alaska, and that this defendant intends to leave the District of Alaska within a few days; but denies that he will take with him any of the said gold-dust.

And further answering the said complaint, this defendant alleges that this defendant and the said Andrew Eadie are the owners of the said placer mining claim, and that the said Eadie and Waskey are in the lawful occupation and possession of the said mining claim under the lease and agreement above mentioned, and have estates in the parts of the said mining claims therein described for the terms of years therein specified.

F. E. FULLER,

Attorney for Defendant J. Potter Whittren.

11 UNITED STATES OF AMERICA,
District of Alaska, Second Division, ss:

I, J. Potter Whittren, being first duly sworn, say: That I am one of the defendants in the above-entitled action; that I have read the foregoing answer to plaintiff's complaint, and know the contents thereof, and that I believe the same to be true.

J. POTTER WHITTREN.

Subscribed and sworn to before me this 12th day of October, A. D. 1906.

[NOTARIAL SEAL.]

O. D. COCHRAN,
Notary Public.

[Endorsed:] Original. No. 1629. District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren, et al., Defendant. Answer of Def. J. P. Whittren. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Oct. 15. 1906. Jno. H. Dunn, Clerk. By ———, Deputy. F. E. Fuller, Attorneys for Def. J. Potter Whittren. 386 Front St., Nome, Alaska.

12 In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

Amended Complaint.

Comes now the plaintiff in the above-entitled action and by leave of the Court first had and obtained, makes this his amended complaint.

I.

That at all the times and dates herein mentioned plaintiff was and is the owner in fee and entitled to the possession of the following-described property, to wit:

Of an undivided one-half of that certain placer mining claim named and known as the Bon Voyage, situated about 1,500 feet in a southerly direction from claim No. 3, Newton Gulch, in the Cape Nome Recording District, District of Alaska.

That plaintiff's estate in said property is under and by virtue of a location thereof by one J. Potter Whittren, one of the defendants, made in the year 1902, and by mesne conveyances from said defendant Whittren to the plaintiff subsequent to said last-mentioned date.

II.

13 That the defendants wrongfully and unlawfully withhold possession of said premises from the plaintiff, and that they have extracted a large amount of gold and other precious metals from said claim, to plaintiff's damage in the sum of seventy-five thousand dollars (\$75,000).

Wherefore, plaintiff prays for an order of this Honorable Court that a restraining order may issue against said defendants, their and each of their servants, agents and employees, and all persons

claiming by, through or under them, or either of them, from extracting any gold from said claim until the further order of this Court, and that plaintiff have judgment in the sum of seventy-five thousand dollars (\$75,000) damages, and for his costs and disbursements herein.

And plaintiff also asks that this complaint be filed nunc pro tunc as of date October 15th, 1906.

C. D. MURANE,
Attorney for Plaintiff.

UNITED STATES OF AMERICA,
District of Alaska, ss:

J. J. Chambers, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he knows the contents of the foregoing complaint, and the same is true as he verily believes.

J. J. CHAMBERS.

Subscribed and sworn to before me this 23 day of October, 1906.

[NOTARIAL SEAL.]

GEO. D. SCHOFIELD,
*Notary Public in and for the District of Alaska,
Residing at Nome.*

14 Service of a copy of the foregoing amended complaint received this 24th day of Oct., 1906.

F. E. FULLER,
Att'y for Deft Whittren.

[Endorsed:] No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Amended Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 24, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. C. D. Murane, Attorney for Plaintiff.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and FRANK H. WASKEY,
Defendants.

[*Demurrer of Andrew Eadie to Complaint.*]

Comes now the defendant, Andrew Eadie, in the above-entitled action, and demurs to the complaint of the plaintiff filed herein, and for cause of demurrer alleges:

15 That said complaint does not state facts sufficient to constitute a cause of action.

O. D. COCHRAN,
Attorney for Defendant Eadie.

Copy received this 6th day of Nov., 1906.

C. D. MURANE,
Attorney for Plaintiff.

[Endorsed:] No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Demurrer of Andrew Eadie to Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Nov. 6, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. O. D. Cochran, Att'y for Defendants.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and FRANK H. WASKEY,
Defendants.

[*Separate Demurrer of Frank H. Waskey to Complaint.*]

Comes now Frank H. Waskey, one of the defendants in the above-entitled action, and for his separate demurrer to plaintiff's complaint:

16 Alleges that said complaint does not state facts sufficient to constitute a cause of action.

ALBERT FINK,
IRA D. ORTON,
Attorneys for Defendant Frank H. Waskey

UNITED STATES OF AMERICA,
District of Alaska, ss:

Due service of the within demurrer of Def't Frank H. Waskey is hereby accepted at Nome, Alaska, this 7th day of November, 1906, by receiving a copy thereof.

Attorney for Plaintiff.

[Endorsed:] No. 1629. Original. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Demurrer Def't Frank H. Waskey. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Nov. 7, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Def't. Frank H. Waskey.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE et al., Defendants.

17 *Demurrer of J. Potter Whittren to Plaintiff's Amended Complaint.*

Comes now the defendant, J. Potter Whittren, by his attorney, and demurs to the amended complaint of the plaintiff filed herein, and, for grounds of demurrer, says that the said complaint does not state facts sufficient to constitute a cause of action.

F. E. FULLER,

Attorney for Defendant J. Potter Whittren.

I hereby certify that I served the within demurrer upon plaintiff's attorney, C. D. Murane, on the 7th day of November, 1906, by leaving a copy thereof in a conspicuous place in his office in Nome, Alaska, to wit, on his office desk, at 3:40 P. M. on said day, no person being in charge of said office.

Dated Nov. 8, 1906.

F. E. FULLER,

Att'y for Def't J. P. Whittren.

[Endorsed:] Original. No. 1629. District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al. Defendants. Demurrer of J. Potter Whittren to Amended Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Nov. 15, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. F. E. Fuller, Attorney for Defendant J. Potter Whittren, Front St., Nome, Alaska.

18 In the District Court for the District of Alaska, Second Division.

Term Minutes, Special September, 1906, Term, begun and held at the Town of Nome, in said District and Division, Sept. 24, 1906.

SATURDAY, Nov. 17, 1906, at 10 a. m.

Court convened pursuant to adjournment.

Present:

Hon. Alfred S. Moore, Judge.

John H. Dunn, Clerk.

Angus McBride, Deputy Clerk.

Geo. B. Grigsby, Acting U. S. Attorney.

Thos. C. Powell, U. S. Marshal.

Now, upon the convening of court, the following proceedings were had:

#1629.

CHAMBERS
vs.
EADIE et al.

[Order Sustaining Demurrers.]

The demurrers of defendants Waskey, Eadie and Whittren were argued by O. D. Cochran for, and by C. D. Murane contra, and demurrers sustained in each case.

19 In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,
vs.

ANDREW EADIE, J. POTTER WHITTREN, and FRANK H. WASKEY,
Defendants.

Second Amended Complaint.

Comes now the plaintiff in the above-entitled action, and by leave of Court first had and obtained, makes this his second amended complaint and for cause of action alleges:

1. That at all the times and dates herein mentioned, plaintiff was and is the owner in fee and entitled to the possession of the following-described property, to wit:

An undivided one-half ($\frac{1}{2}$) interest of that certain placer mining claim named and known as the Bon Voyage, situate in the Cape Nome Recording District, District of Alaska, and described by meets and bounds as follows, to wit: Commencing at the initial stake which is situated about 1,500 feet in a southerly direction from the upper end line of Creek claim No. 3 Below, on Newton Gulch, a tributary of Dry Creek, said stake being in the north end line of said claim; thence 330 feet in a westerly direction and parallel to said Newton Gulch to corner stake No. 1; thence 1320 feet
20 in a southerly direction and at right angles to corner stake No. 2, thence 660 feet in an easterly direction to corner stake No. 3; thence 1320 feet in a northerly direction to corner stake No. 4; thence 330 feet to the initial stake or place of beginning; said claim being situate on the divide known as Gold Hill, which is between Newton Gulch and Nome River, and is next to a certain bench claim known as Gold Hill Claim No. 1, and contains about 20 acres of placer mining ground.

That plaintiff's estate in said property is under and by virtue of a location thereof by one J. Potter Whittren, one of the above defendants, made in the year 1902, and by mesne conveyance, from said defendant Whittren, to this plaintiff, subsequent to last-mentioned date.

2. That the defendants wrongfully and unlawfully withhold possession of said premises from plaintiff, and have extracted a large amount of gold and other precious metals from said claim to the plaintiff's damage in the sum of seventy-five thousand dollars (\$75,000).

Wherefore, plaintiff prays judgment that he is the owner of an undivided one-half ($\frac{1}{2}$) interest in said claim, and for possession thereof, and for damages in the sum of seventy-five thousand dollars (\$75,000), and for his costs and disbursements included in this action.

C. D. MURANE,
Attorney for Plaintiff.

21 UNITED STATES OF AMERICA,
District of Alaska, ss:

J. J. Chambers, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing second amended complaint, known the contents thereof, and the matters therein stated are true, as he verily believes.

J. J. CHAMBERS.

Sunscribed and sworn to before me this 20th day of November, 1906.

[NOTARY SEAL.]

GEO. D. SCHOFIELD,
Notary Public.

Service of copy of the foregoing second amended complaint received this 20 day of November, 1906.

IRA D. ORTON,
For Waskey.
O. D. COCHRAN,
Attorney for Defendant.

[Endorsed:] No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Second Amended Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome Nov. 23, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. C. D. Murane, Attorney for Plaintiff.

22 In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

Answer of J. Potter Whittren to Plaintiff's Second Amended Complaint.

Now comes the defendant J. Potter Whittren, by his attorney, and answering plaintiff's second amended complaint, denies each and every allegation therein contained, except only he admits that the premises mentioned were duly located by this defendant as a Placer Mining Claim in the year 1902.

2. And further answering said complaint this defendant alleges that he is the owner in fee of one undivided half part of the Bon Voyage Placer Mining Claim, mentioned and described in plaintiff's second amended complaint and that he has been such owner since on or about the first day of January, 1902; that on said date this defendant duly located and appropriated the same as a placer mining claim, and that ever since he has been in the possession thereof and entitled to such possession, except that on or about the 11th day of June, 1906, he demise and let the westerly 220 feet thereof to the defendant Frank H. Waskey for a term of
23 two years, and that the defendants Waskey and Eadie have been in the possession of the remainder of said claim since on or about the 20th day of June, 1906, under and by virtue of the terms of an agreement that day made by the defendants.

3. And for further a answer to plaintiff's second amended complaint, and by way of counterclaim, this defendant alleges that he is the owner in fee of an undivided half part of that certain placer mining claim known as the Bon Voyage, situate in the Cape Nome Recording District, Alaska, as the same is particularly bounded and described in the plaintiff's second amended complaint, and that he has been such owner and entitled to and in the actual possession of the same since the first day of January, 1902, under and by virtue of the due location of the said premises as placer mining claim made the said first day of January, 1902, by this defendant; except that since on or about the 11th day of June, 1906, the defendant F. H. Waskey has been in the possession of the westerly 220 feet of said premises under and by virtue of a lease of the said premises for the term of two years on that day made by the defendants; and that since on or about the 20th day of June, 1906, the defendants Andrew Eadie and Frank H. Waskey have been in the possession of the remainder of the said mining claim under and according to the terms of an agreement for the working of the said premises for the term of two years after said 20th day of June, 1906.

That on or about the 20th day of July, 1906, plaintiff caused

24 to be filed and recorded in the office of the Recorder of the Cape Nome Recording District, Alaska, a certain paper writing purporting to be a conveyance of an undivided one-half interest in the said Bon Voyage Placer Mining Claim from this defendant to the plaintiff, a copy whereof is hereto annexed, marked Exhibit "A"; and that ever since the 20th day of July, 1906, plaintiff has claimed adversely to this defendant, a one-half interest in the said placer mining claim under and by virtue of the said alleged conveyance.

That said paper writing, recorded as aforesaid, was not and is not the deed or conveyance of this defendant, all of which was and is well-known to the plaintiff, and that the said plaintiff wrongfully and fraudulently caused the said paper writing to be placed on record, well knowing that the same was fraudulent and void, and has ever since and now does claim some interest or estate in the said premises thereunder, but that the plaintiff has no claim, estate, or interest in or to the said premises, or any part thereof.

Wherefore, this defendant prays judgment that the complaint of the plaintiff herein be dismissed and that it be adjudged and decreed that this defendant is the owner of an undivided one-half part of the said premises, and that the plaintiff has no claim, estate or interest therein; that the paper writing herein mentioned be adjudged and decreed not to be the deed of this defendant, and that the same is void and of none effect, and that the plaintiff be forever enjoined and debarred from asserting any claim, right, title, estate or interest under said paper writing or in or to the said premises, or any part thereof;

25 And this defendant further prays that the plaintiff be enjoined and restrained, pending this action, from selling, conveying, leasing, mortgaging or in anywise disposing, or attempting to dispose, of or encumbering the said premises or any part thereof, and for such other and further relief as may be meet.

F. E. FULLER,

Attorney for Defendant J. Potter Whittren.

EXHIBIT "A."

#35972.

Know all men by these presents: That J. Potter Whittren, of Nome City, Alaska, the party of the first part, for and in consideration of the sum of One (\$1.00) Dollar, Lawful — of the United States of America, to him in hand paid by J. J. Chambers of the same place, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, an undivided one-half ($\frac{1}{2}$) interest in the following described property Bench Claim known as the "Rocky Bench" opposite No. 2, in "Extra Dry," a tributary to Nome River, staked Jan. 1st, 1902.

The "Bon Voyage" Bench Claim on the left limit of Newton

Gulch, opposite No. 3 above 1500 ft. to the southeast, staked Jan. 1st, 1902.

26 No. 5½ Little Creek, a tributary to Snake River, said 5½ being a fraction at No. 5 below Discovery in Little Creek, all of the above being in Cape Nome Recording District, District of Alaska, and staked by J. Potter Whittren.

To have and to hold, the same to the said party of the second part, his executors, administrators and assigns, forever. And he does for his heirs, executors, administrators, covenant and agree to and with the said part of the second part, executors, administrators and assigns to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In witness whereof, I have hereunto set my hand and seal the 21st day of April, in the year of our Lord one thousand nine hundred two—1902.

J. POTTER WHITTREN. [SEAL.]

Signed, Sealed and Delivered in Presence of:

F. E. FULLER.

TERRITORY OF ALASKA,
Precinct of Nome, ss:

This is to certify, that on this 21st day of April, A. D. 1902, before me, F. E. Fuller, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came J. Potter Whittren, to me known to be the individual described in and who executed the within instrument, and acknowledged to me
27 that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and Official Seal, the day and year in this certificate first above written.

[NOTARIAL SEAL.]

F. E. FULLER,

*Notary Public in and for the Territory
of Alaska, Residing at Nome.*

Filed for record July 20, 1906—2 P. M.
Request of J. J. Chambers.

F. E. FULLER, *Recorder,*
F. R. COWDEN, *Deputy.*

(Vol. 163, page 387.)

UNITED STATES OF AMERICA,
District of Alaska, Second Division:

I, F. E. Fuller, being first duly sworn, say: That I am the attorney for the within named defendant J. Potter Whittren in the above-entitled action; that I have read the foregoing answer and know the contents thereof, and that I believe the same to be true;

that I make this affidavit and verification for the reason that the said defendant is not within the District of Alaska.

F. E. FULLER.

Subscribed and sworn to before me this 26th day of November, A. D. 1906.

[NOTARIAL SEAL.]

F. R. COWDEN,
*Notary Public in and for the District of
Alaska, Residing at Nome, Alaska.*

28 Service of the within answer and receipt of copy acknowledged this 27 day of Nov.

C. D. MURANE,
Attorney for Plaintiff.

[Endorsed:] Original. No. 1629. District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Answer of J. Potter Whittren to Plaintiff's Second Amended Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Nov. 27, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. L. Fuller, Attorney for Defendant J. Potter Whittren, Nome, Alaska.

In the District Court, District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE et al., Defendant.

[*Plaintiff's Demurrer to Further Answer, etc., of J. Potter Whittren.*]

Comes now the plaintiff by his attorney C. D. Murane, and demurs to the further answer and also to the further answer and counterclaim of the defendant J. Potter Whittren, and for cause of demurrer alleges:

I.

29 That said affirmative matter set out in said further answer and in *s* said further answer by way of counterclaim does not state facts *s* sufficient to constitute a defense or counterclaim.

C. D. MURANE,
Attorney for Plaintiff.

[Endorsed:] No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Demurrer. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Dec. 28, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. C. D. Murane, Attorney for Plaintiff.

District Court, District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

[*Answer of Frank H. Waskey to Second Amended Complaint.*]

Comes now Frank H. Waskey, one of the defendants in the above-entitled action, and for answer to plaintiff's second amended complaint denies and alleges as follows:

I.

Denies each and every allegation of plaintiff's second amended complaint.

30

II.

And for a further, separate and affirmative answer said defendant Waskey alleges:

1. That the Bon Voyage Claim mentioned and described in plaintiff's said second amended complaint was located as a placer mining claim by the defendant Whittren on the 1st day of January, 1902; that from the 1st day of January, 1902, until the 24th day of September, 1905, the said Whittren continued to be the owner in fee of said claim; that on the said 24th day of September, 1905, the said Whittren, for a valuable consideration, by deed in writing, granted, sold and conveyed to the defendant Eadie an undivided one-half interest in said claim, and ever since the said last mentioned date the said Whittren and the said Eadie have been, and they now are, the sole owners of said claim as tenants in common.

2. That on the 11th day of June, 1906, the said Whittren and the said Eadie were so the owners of said claim as tenants in common, and were then and there in the sole, quiet and exclusive possession of the same, and on said date the said Whittren and Eadie did by an instrument in writing, lease, let and demise a portion of said claim to the defendant Waskey for the term to commence at the execution of said lease and ending on the 1st day of June, 1908; that the portion of said claim so leased, demised and let to this defendant is bounded and described as follows:

31

All the following described lands and premises, situate in Cape Nome Mining and Recording District, District of Alaska, to wit: Commencing at the southwest corner stake of the Bon Voyage Placer Mining Claim; thence northerly along the westerly boundary line of said mining claim 1320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1320 feet to the southerly boundary line of said mining claim; thence westerly 220 feet to the point and place of beginning; being a part of the said

Bon Voyage Placer Mining Claim, the location notice whereof is of record in the office of the Recorder of said Cape Nome Recording District in Book 99, at page 296, of the Records of said District.

That immediately upon the execution of said lease the defendant Waskey entered upon said portion of said claim and commenced to mine and prospect the same for gold in accordance with the terms of said lease, and is still so engaged; that the defendant Waskey has at all times kept and performed, and is now keeping and performing, all the terms of said lease on his part to be kept and performed; that defendant made and entered into said lease in good faith, for a valuable consideration, without any knowledge or notice whatever of plaintiff's alleged interest in said claim, and defendant commenced and continued to work, mine, and operate said claim for a long period of time, in like good faith, at great expense and without any knowledge or notice of plaintiff's alleged interest in said claim.

32 That said lease hereinbefore referred to was by this defendant, on August 22d, 1906, filed for record in the Office of the Recorder of the Cape Nome Recording District, District of Alaska, within which said claim was and is situated, and was thereafter duly recorded in Vol. 164, at page 133 of the Records of said District; that a true copy of said lease is hereunto annexed, marked Exhibit "A," and made a part of this answer.

3. The defendant Waskey further alleges that afterwards, to wit, on the 20th day of June, 1906, the said Whittren and the said Eadie were so the owners of said claim as tenants in common, and were then and there, together with this defendant as lessee of *of* the portion thereof hereinbefore described, in the sole, quiet and exclusive possession of the said claim, and on the said 20th day of June, 1906, the said Whittren, Eadie, and this defendant made and entered into a certain lease and contract of the remaining portion of said mine for the term commencing on said 20th day of June, 1906, and ending on the 20th day of June, 1908; that the remaining portion of said mine described in said lease and contract last hereinabove referred to is described as follows:

The easterly 440 feet of said mining claim, being all of the said claim not heretofore leased by the said Eadie and the said Whittren to the said Waskey.

That immediately upon the execution of said contract and lease, the defendant Eadie and Waskey entered upon said portion of said claim described therein and commenced to mine and prospect
33 the same for gold in accordance with the terms of said lease and they are still so engaged; that the defendants Waskey and Eadie have at all times kept and performed, and are now keeping and performing, all the terms of said contract and lease on their part to be kept and performed.

That the said Waskey made and entered into said contract and lease in good faith, for a valuable consideration, without any knowledge or notice whatever of plaintiff's alleged interest in said claim, and the said defendant Waskey commenced and continued to work, mine and operate said claim and the portion described in

said contract and lease last hereinbefore referred to for a long period of time, in like good faith, at great expense and without any knowledge or notice of plaintiff's alleged interest in said claim.

That said lease and contract last hereinbefore referred to was by this defendant, on the 30th day of August, 1906, filed for record in the Office of the Recorder of the Cape Nome Recording District, District of Alaska, within which said claim was and is situated, and was thereafter duly recorded in Vol. 164, at page 138 of the Records of said District; that a true copy of said contract and lease is hereto annexed, marked Exhibit "B" and made a part of this answer.

4. This defendant Waskey further alleges that he has hereinbefore set forth the nature and duration of his estate in the real property described in plaintiff's complaint and of his license and
34 right to the possession thereof, and further alleges that he is in the possession of said property under and by virtue and pursuant to the two leases and contracts, Exhibits "A" and "B," hereinbefore mentioned.

Wherefore, having fully answered this defendant prays to go hence dismissed with judgment for his costs.

ALBERT FINK,
IRA D. ORTON,

Attorney- for Defendant Frank H. Waskey.

UNITED STATES OF AMERICA,
District of Alaska, ss:

Ira D. Orton, being first duly sworn, deposes and says: That he is the attorney for Frank H. Waskey, one of the defendants in the above-entitled action; that he has read the above and foregoing answer and knows the contents thereof and believes the same to be true; that the reason this affidavit is made by affiant instead of the said Frank H. Waskey is because the said Frank H. Waskey is absent from the District of Alaska, and for that reason unable and incapable of making this verification.

IRA D. ORTON.

Subscribed and sworn to before me, this 14th day of January, 1907.

[NOTARIAL SEAL.]

IDA G. CHAQUETTE,
*Notary Public in and for the District of
Alaska, Residing at Nome.*

35

EXHIBIT "A."

#36729.

This indenture, made this eleventh day of June, in the year nineteen hundred and six, between Andrew Eadie and J. Potter Whittren, both of Nome, Alaska, lessors, and F. H. Waskey, of the same place, lessee, witnesseth:

That the said lessors, for and in consideration of the rents, royal-

ties, covenants, and agreements hereinafter reserved and contained and by the said lessee to be paid, kept, and performed, do hereby lease, demise and let unto the said lessee all the following described lands and premises, situated in Cape Nome Mining and Recording District, District of Alaska, to wit: Commencing at the southwest corner stake of the Bon Voyage Placer Mining Claim; thence northerly along the westerly boundary line of said mining claim 1320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1320 feet to the southerly boundary line of said mining claim; thence westerly 220 feet to the point and place of beginning; being a part of the said Bon Voyage Placer Mining Claim, the location notice whereof is of record in the office of the recorder of said Cape Nome Recording District in book 99, page 296, of the records of the said district.

To have and to hold all and singular the said demised
36 premises, together with the appurtenances, unto the said lessee for the term commencing on the date hereof and expiring at noon on the first day of June, nineteen hundred and eight, unless sooner forfeited or determined through the violation by the said lessee of any covenant or agreement hereinafter contained and by him to be kept and performed.

And in consideration of such demise and lease the said lessee does covenant and agree with the said lessors as follows, to wit:

1. To enter upon the said premises within five days from the date hereof and thereafter to prospect, work, and mine the same in good and miner-like manner, so as to take out the greatest possible amount of gold and gold-dust therefrom, with due regard to the continued future working of the said mining claim and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously during the term of this lease; cessation of labor for a period of ten days to be deemed a violation of this agreement.

2. To properly timber all shafts and to keep all shafts, tunnels, drifts, and stopes clear and in good and safe condition.

3. To allow the said lessors, and their agent or agents, at all times, to enter upon and into all parts of the said premises, for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort.

4. To give to the said lessors, at Nome, Alaska, at least ten hours' notice of each and every cleanup, and to make no cleanup without giving such notice.

- 37 5. To make and file for record an affidavit of the performance of the required annual labor upon the said mining claim, during each calendar year of the term of this lease.

6. To pay to the said lessors, as royalty, thirty-five per centum (35%) of all gold, gold-dust, and other precious minerals and metals mined or extracted from the said premises during the term of this lease, and to pay and deliver to the said lessors such royalty out of, and immediately after, each and every cleanup.

7. To allow no person or persons not in privity with the said

parties hereto to take or hold possession of the said premises, or any part thereof, under any pretense whatever, during the said term.

8. Not to assign this lease, or any interest herein, and not to sublet the said premises, or any part thereof, without the written consent of the said lessors.

9. To quit and deliver up to the said lessors the possession of the said premises, X—x, in good order and condition for continued future mining, without demand or further notice, on said first day of June, 1906, or at any time previous upon demand for forfeiture.

It is expressly agreed that, upon the violation by the said lessee of any covenant or agreement herein contained, this lease, and the term hereof, shall, at the option of the lessors, become forfeited and determined, and the said lessors may at once enter into the possession of the said premises and remove any and all persons found thereon.

38 Each and every part and covenant hereof shall extend to and be binding upon the heirs, executors, administrators, and assigns of the lessors, and, at the option of the lessors, the executors, administrators, and assigns of the said lessee.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Done in triplicate.

ANDREW EADIE.	[SEAL.]
J. POTTER WHITTREN.	[SEAL.]
F. H. WASKEY.	[SEAL.]

Signed, sealed and delivered in the presence of

F. E. FULLER.
A. G. BLAKE.

DISTRICT OF ALASKA,

Cape Nome Precinct, ss:

This is to certify, that on this 11th day of June, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

Witness my hand and notarial seal this 11th day of June, A. D. 1906.

[NOTARIAL SEAL.]

F. E. FULLER,
Notary Public for Alaska.

39 Filed for record Aug. 22, 1906, 2:20 P. M. Request of
F. H. Waskey.

F. E. FULLER,
Recorder.
_____,
Deputy.

UNITED STATES OF AMERICA,

District of Alaska, Precinct of Cape Nome, ss:

I, F. E. Fuller, United States Commissioner and Ex-Officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full and complete copy of Instrument numbered 36729, the same being Agreement Between Andrew Eadie, and J. Potter Whittren, Lessors, and F. H. Waskey, Lessee, as the same appears of record in Volume 164, at page 133 thereof, of the records of my office.

Witness my hand and the seal of the said office this 12th day of October, 1906.

[SEAL.]

F. E. FULLER,

Recorder,

By F. R. COWDEN,

Deputy.

EXHIBIT "B."

#36869.

Agreement.

This agreement, made this 20th day of June, in the year 40 nineteen hundred and six, by and between Andrew Eadie, J. Potter Whittren, and F. H. Waskey, all of Nome, Alaska, Witnesseth:

Whereas, the said Eadie and Whittren are the owners of the Bon Voyage Mining Claim, situate in Cape Nome Mining District, Alaska, the location notice whereof is of record in the office of the Recorder of the Cape Nome Recording District, in book 99, at page 296 of the Records of said District:

And whereas, the said Eadie and Waskey desire to work and mine the easterly 440 feet of said mining claim, being all of the said claim not heretofore leased by the said Eadie and Whittren to the said Waskey:

Now, therefore, in consideration of the premises and of the sum of One (\$1.00) Dollar, by the said parties paid, each to the other, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is agreed as follows:

The said Eadie and Waskey agree to enter upon the said premises within one day from the date hereof, and thereafter to prospect, work and mine the same in good and miner-like manner so as to take out the greatest amount of gold and gold-dust therefrom, with due regard to the continued future working of the said premises and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously for the full term of two (2) years from the date hereof, or until said premises shall have been thoroughly and completely mined and worked out; cessation of labor for a period of ten (10) days to be deemed a violation of this agreement.

41 To properly timber all shafts and to keep all shafts, tunnels, drifts and stopes clear and in good and safe condition.

To allow the said Whittren or his agent at all times to enter upon and into all parts of the said premises for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retorts, and to give said Whittren or his agents due notice of each and every cleanup.

It is agreed that of all the gold, gold-dust and other precious minerals and metals mined or extracted from the said premises by the said Eadie and Waskey, under this agreement, one-eighth ($\frac{1}{8}$) part shall be paid and delivered to said Whittren immediately after each and every cleanup, and one-eighth ($\frac{1}{8}$) part to the said Eadie, and the remainder shall be retained by, and equally divided between the said Waskey and Eadie, after paying from such remainder all costs and expenses of mining and operating under this agreement; the expense of first locating pay, however, to be borne solely by said Waskey.

In witness whereof, the said parties have hereunto set their hands and seals in triplicate, the day and year first above written.

J. POTTER WHITTREN. [SEAL.]
 ANDREW EADIE. [SEAL.]
 F. H. WASKEY. [SEAL.]

Signed, sealed and delivered in the presence of
 P. D. OVERFIELD.

42 DISTRICT OF ALASKA,
Cape Nome Precinct, ss:

This is to certify that on this 30th day of August, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Aadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

Witness my hand and notarial seal this 30th day of August, A. D. 1906.

[NOTARY SEAL.]

F. E. FULLER,
Notary Public for Alaska.

Filed for Record Aug. 30, 1906, 2:50 P. M.
 Request of F. H. Waskey,

F. E. FULLER, *Recorder.*
 ———, *Deputy.*

(Vol. 164, Page 138.)

UNITED STATES OF AMERICA,
District of Alaska, Precinct of Cape Nome, ss:

I, F. E. Fuller, United States Commissioer and Ex-Officio Recorder in and for the Precinct of Cape Nome in the Second Judicial

43 Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full and complete copy of Instrument numbered 36869, the same being agreement between Andrew Eadie, J. Potter Whittren and F. H. Waskey, as the same appears of record in Volume 164, at page 138 thereof, of the records of my office.

Witness my hand and seal of the said office this 12th day of October, 1906.

[SEAL.]

F. E. FULLER, *Recorder*,
By F. R. COWDEN, *Deputy*.

UNITED STATES OF AMERICA,
District of Alaska, ss:

Due service of the within answer is hereby accepted at Nome, Alaska, this 14 day of January, 1907, by receiving a copy thereof.

C. D. MURANE,
Attorney for Plff.

[Endorsed:] #1629. Original. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, et al., Defendants. Answer of Waskey to Second Amended Complaint. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 15, 1907, Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Deft. F. H. Waskey.

44 [*Answer of Andrew Eadie to Second Amended Complaint.*]

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and FRANK WASKEY,
Defendants.

Answer.

Comes now the defendant, Andrew Eadie, and answering the second amended complaint of the plaintiff filed herein, admits, deny-s and alleges:

I.

Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph I of said second amended complaint, and demands proof thereof.

II.

Denies generally each and every allegation contained in Paragraph II of said second amended complaint.

And for a further separate answer and defense to said second amended complaint, answering defendant alleges:

I.

That he is the owner in fee of an undivided one-half ($\frac{1}{2}$) interest of the premises described in plaintiff's second amended complaint, in the possession and entitled to the possession of the same.

Wherefore, this answering defendant, having fully answered the second amended complaint of plaintiff filed herein demands judgment that he is the owner in fee of an undivided one-half ($\frac{1}{2}$) interest in said premises described in plaintiff's second amended complaint and entitled to the possession of the same, and for his costs and disbursements herein incurred.

O. D. COCHRAN,

Attorney for Defendant Eadie.

UNITED STATES OF AMERICA,

District of Alaska, ss:

Andrew Eadie, being first duly sworn, deposes and says:

That he is the answering defendant named in the foregoing answer; that he has read the same, knows the contents thereof and that the same is true as he verily believes.

ANDREW EADIE.

Subscribed and sworn to before me, this 8th day of February, 1907.

[NOTARY SEAL.]

O. D. COCHRAN,

Notary Public in and for the District of Alaska.

Received a copy of the foregoing answer this 8th day of Feb., 1907.

C. D. MURANE,

Att'y for Plaintiff.

46 [Endorsed:] No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, et al., Defendants. Answer. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Feb. 9, 1907, Jno. H. Dunn, Clerk. By ———, Deputy. O. D. Cochran, Atty. for Defendant, Eadie.

[*Order Overruling Plaintiff's Demurrer to Defendants' Answer.*]

In the District Court for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

Order Overruling Demurrer.

This case comes on for hearing upon plaintiff's demurrer to defendant's answer.

The demurrer was submitted without argument, upon the pleadings and files in the case, and the Court having examined the pleadings and files herein and being fully advised in the premises orders that the said demurrer be and the same is hereby overruled.

ALFRED S. MOORE,

Dist. Judge.

Nome, Alaska, April 20, 1907.

47 [Endorsed:] No. 1629. In the United States District Court for the District of Alaska, Second Division. J. J. Chambers vs. Andrew Eadie, et al. Order Overruling Demurrer. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Apr. 22, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. Vol. 5, Orders and Judgments, p. 197. Comp. McB.

[*Plaintiff's Reply to Separate Answer of J. Potter Whittren.*]

In the District Court for the District of Alaska, Second Division.

No. —.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

Reply.

Comes now plaintiff J. J. Chambers and for reply to the separate answer of J. Potter Whittren in the above-entitled action, denies any knowledge or information sufficient to form a belief as *the* the execution of the lease or leases mentioned on the first page of said answer; and,

Denies any knowledge or information sufficient to form a belief as to whether said defendant- Waskey and Eadie are "working and

48 mining the same under said lease and agreement," or under any agreement as set forth in said answer upon said first page, and therefore denies each and all of said allegations.

Plaintiff denies each and every allegation contained in said answer commencing with the words "and further answering" in the last line of the first page of said answer and ending with the words "years therein specified," on the second page of said answer, and the whole thereof.

Wherefore, plaintiff, having fully replied to the answer of the said defendant Whittren, demands judgment as he has heretofore demanded in his complaint on file herein.

C. D. MURANE,
Attorney for Plaintiff.

UNITED STATES OF AMERICA,
District of Alaska, ss:

J. J. Chambers, being first duly sworn, upon his oath deposes and says:

I am the plaintiff in the foregoing reply; I have read said reply, know the contents thereof, and the matters therein stated are true as I verily believe.

J. J. CHAMBERS.

Subscribed and sworn to before me, this 10 day of June, 1907.

[NOTARIAL SEAL.]

C. D. MURANE,
*Notary Public in and for the District
of Alaska, Second Division.*

Service of the foregoing reply admitted by copy the 10th day of June, 1907.

F. E. FULLER,
Att'y for Def't Whittren.

49 [Endorsed:] No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, v. Andrew Eadie, J. Potter Whittren and Frank H. Wasky, Defendants. Reply to Answer to Deft. Whittren. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jun. 10, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. C. D. Murane, Attorney for Plaintiff. McB.

[Plaintiff's Reply to Separate Answer of Frank H. Waskey to Second Amended Complaint.]

In the District Court for the District of Alaska, Second Division.

No. —.

J. J. CHAMBERS, Plaintiff,

v.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

Reply.

Comes now the plaintiff J. J. Chambers and for reply to the separate answer of the defendant Frank H. Waskey to plaintiff's second amended complaint, denies and alleges as follows:

I.

For reply to Paragraph I to defendant's further separate and affirmative answer and defense, plaintiff denies each and
50 every allegation contained in said paragraph, except that the Bon Voyage Claim was located as a placer mining claim by the defendant Whittren on the 1st day of January, 1902, and that the said defendant Whittren for a valuable consideration by deed in writing, granted, sold and conveyed to the defendant Eadie an undivided one-half ($\frac{1}{2}$) interest in said claim.

II.

For reply to the second paragraph of said answer, plaintiff denies any knowledge or information sufficient to form a belief as to the matters contained in said paragraph, and therefore denies the allegations of said paragraph and the whole thereof, except that plaintiff admits that said Bon Voyage Claim is situated in the Cape Nome Recording District, District of Alaska.

III.

For reply to Paragraph III of said answer of defendant Waskey, plaintiff denies any knowledge or information sufficient to form a belief as — the truth of the matters therein stated, and therefore denies each and every allegation contained in said paragraph, except that said claim is situated in the District of Alaska.

IV.

For reply to Paragraph IV of said answer of the defendant Waskey, plaintiff denies any knowledge or information sufficient to form a belief as to the truth of the matters therein stated, and therefore denies each and every allegation contained in said paragraph.

51 Wherefore plaintiff, having fully replied to the said answer of the defendant Waskey, prays judgment as he has heretofore prayed in his complaint on file herein.

C. D. MURANE,
Attorney for Plaintiff.

UNITED STATES OF AMERICA,
District of Alaska, ss:

J. J. Chambers, being first duly sworn, upon his oath deposes and says: I am plaintiff in the foregoing reply, have read said reply and know the contents thereof, and the matters therein stated are true as I verily believe.

J. J. CHAMBERS.

Subscribed and sworn to before me this 10th day of June, 1907.

[NOTARY SEAL.]

C. D. MURANE,
*Notary Public in and for the District of Alaska,
Residing at Nome, Alaska.*

Service of the foregoing reply received by copy this 10th June, 1907.

IRA D. ORTON,
Att'y for Deft Frank H. Waskey.

[Endorsed:] No. 1629. In the District *District* Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, v. Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants. Reply to Answer of Deft. Waskey. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jun. 52 10, 1907. Jno. H. Dunn, Clerk. By ———, Deputy.
C. D. Murane, Attorney for Plaintiff. McB.

[*Plaintiff's Reply to Answer of J. Potter Whittren to Second Amended Complaint.*]

In the District Court for the District of Alaska, Second Division.

No. —.

J. J. CHAMBERS, Plaintiff,
vs.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

Reply to Answer of J. Potter Whittren to Plaintiff's Second Amended Complaint.

Comes now the plaintiff in the above-entitled action, J. J. Chambers, and for reply to answer of J. Potter Whittren to plaintiff's second amended complaint, denies each and every allegation contained

in Paragraph II of said answer, except the allegation that the defendants duly located and appropriated said placer mining claim on the 1st day of January, 1902.

For reply to Paragraph III, being designated as a further answer to plaintiff's second amended complaint, by way of counterclaim, plaintiff denies each and every allegation contained in said
53 counterclaim and the whole thereof, except that plaintiff admits that on or about the 20th day of July, 1906, he caused to be filed and recorded in the office of the Recorder of the Cape Nome Recording District, Alaska, a certain paper writing, a conveyance to an undivided one-half ($\frac{1}{2}$) interest in the Bon Voyage Placer Mining Claim from the defendant Whittren to this plaintiff and this plaintiff claims a one-half ($\frac{1}{2}$) interest in said mining claim, adversely to said defendant Whittren.

Wherefore, plaintiff, having fully replied to answer of the said defendant Whittren to plaintiff's second amended complaint, prays judgment as he has heretofore prayed in his said complaint.

C. D. MURANE,
Attorney for Plaintiff.

UNITED STATES OF AMERICA,
District of Alaska, ss:

J. J. Chambers, being first duly sworn, upon his oath deposes and says:

I have read the foregoing reply, know the contents thereof and the matters therein stated are true as I verily believe.

J. J. CHAMBERS.

Subscribed and sworn to before me this 17 day of June, 1906.

[NOTARIAL SEAL.]

C. D. MURANE,
*Notary Public in and for the District of Alaska,
Residing at Nome, Alaska.*

Copy rec'd June 17, 1907.

F. E. FULLER,
Att'y for Def't Whittren.

54 [Endorsed:] No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, v. Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants. Reply to Answer of J. Potter Whittren to Plaintiff's Second Amended Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 17, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. C. D. Murane, Attorney for Plaintiff McB.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

[Amended Answer of Andrew Eadie to Second Amended Complaint.]

Comes now the defendant, Andrew Eadie, and leave of Court being first had and obtained, files this his amended answer to the second amended complaint of the plaintiff filed herein, and answering said complaint admits, denies and alleges:

I.

Denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph I of said second amended complaint, and demands proof thereof.

55

II.

Denies generally each and every allegation contained in Paragraph II of said second amended complaint.

And for a first further and separate defense to said action, answering defendant alleges:

I.

That he is now and has been since the 24th day of September, 1905, the owner in fee of an undivided one-half of the premises described in plaintiff's second amended complaint, in the possession and entitled to the possession of the same.

And for a further and second separate answer and defense to said action, this answering defendant alleges:

I.

That on and prior to the 20th day of June, 1906, the defendant Whittren personally and through his lessee, the defendant, Frank H. Waskey, were in the actual possession of an undivided one-half of the same mining claim described in plaintiff's complaint, and the said defendant Whittren claiming to be the owner in fee of said undivided one-half of said mining claim.

II.

That on the said 20th day of June, 1906, this answering defendant and the defendant, Frank H. Waskey, relying upon the claims and representations of the said defendant Whittren, did in good faith

and without any knowledge whatever of the pretended claim of the plaintiff in said premises lease from the said defendant Whittren and said defendant Eadie, for valuable consideration the easterly 440 feet of said mining claim, and the said defendants Whittren and Waskey and this answering defendant, upon said date, made and entered into *into* a certain lease and contract, whereby the said defendant Waskey and this answering defendant did lease the said easterly 440 feet of said mining claim, a copy of which said lease and contract is annexed to this complaint and marked Exhibit "A," and hereby referred to and made a part hereof.

III.

That immediately upon the execution of said contract and lease, the defendants Eadie and Waskey, in good faith and without any notice whatever of the pretended claim of the plaintiff to said mining claim, entered upon said portion of said claim described in said contract and lease and commenced to mine and prospect the same for gold in accordance with the terms of said lease, and continued to prospect and mine said claim in accordance with the terms of said contract and lease until prevented from so doing by an order of this Court, and in prospecting and mining said portion of said mining claim described in said contract and lease expended upwards of the sum of Ten Thousand (\$10,000.00) Dollars, and expended a large amount of money in prospecting and mining said ground prior to the commencement of this action; that defendants, Waskey and Eadie, have at all times kept and performed, and are now keeping and performing all the terms of said contract and lease on
57 their part to be kept and performed; that said lease and contract hereinbefore referred to was on the 30th day of August, 1906, filed for record in the office of the Recorder of the Cape Nome Mining and Recording District, District of Alaska, within which said claim was and is situated, and was thereafter duly recorded in Volume 164, at page 138 of the Records of said Mining and Recording District.

IV.

That the nature and duration of the estate of the said answering defendant in said undivided one-half of said mining claim claimed by the plaintiff is an leasehold estate for years as set forth in said contract and lease marked Exhibit "A," a copy of which is hereto attached.

V.

That the answering defendant is in the possession of said portion of said mining claim described in said contract and lease pursuant to the terms and conditions thereof.

Wherefore, this answering defendant, having fully answered the second amended complaint of the plaintiff filed herein, demands judgment that he is the owner in fee of an undivided one-half of said mining claim described in plaintiff's second amended complaint, and entitled to the possession of the same, and that he has an lease-

hold estate for years, according to the terms of the lease and contract hereinbefore referred to, and for his costs and disbursements incurred in this action.

O. D. COCHRAN,
Attorney for Defendant Andrew Eadie.

58 UNITED STATES OF AMERICA,
District of Alaska, ss:

Andrew Eadie, being first duly sworn, deposes and says: That he is one of the defendants named in the above-entitled action; that he has read the foregoing amended answer, knows the contents therefore, and the same is true as he verily believes.

ANDREW EADIE.

Subscribed and sworn to before me, this 23 day of July, 1907.

O. D. COCHRAN,
Notary Public in and for the District of Alaska.

EXHIBIT "A."

Agreement.

This agreement, made this 20th day of June, in the year nineteen hundred and six, *Bu* and Between Andrew Eadie, J. Potter Whittren, and F. H. Waskey, all of Nome, Alaska, Witnesseth,

Whereas, the said Eadie and Whittren are the owners of the Bon Voyage Placer Mining Claim, situate in Cape Nome Mining District, Alaska, the location notice whereof is of record in the office of the Recorder of the Cape Nome Recording District, in book 99, at page 296 of the Records of said District;

And whereas, the said Eadie and Waskey desire to work and mine the easterly 440 feet of said mining claim, being all of the said claim not heretofore leased by the said Eadie and Whittren to the said Waskey;

59 Now therefore, in consideration of the premises and of the sum of One (\$1.00) Dollar, by the said parties paid, each to the other, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is agreed as follows:

The said Eadie and Waskey agree to enter upon the said premises within one day from the date hereof, and thereafter to prospect, work and mine the same in good and miner-like manner so as to take out the greatest amount of gold and gold-dust therefrom, with due regard to the continued future working of the said premises and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously for the full term of two (2) years from the date hereof, or until said premises shall have been thoroughly and completely mined and worked out; cessation of labor for a period of ten (10) days to be deemed a violation of this agreement.

To properly timber all shafts and to keep all shafts, tunnels, drifts and stopes clear and in good and safe condition;

To allow the said Whittren or his agent at all times to enter upon and into all parts of the said premises for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort, and to give said Whittren or his agent due notice of each and every cleanup.

It is agreed that of all the gold, gold-dust and other precious minerals and metals mined or extracted from the said premises by the said Eadie and Waskey, under this agreement, one-
60 eighth ($\frac{1}{8}$) part shall be paid and delivered to said Whittren immediately after each and every cleanup, and one-eighth ($\frac{1}{8}$) part to the said Eadie, and the remainder shall be retained by, and equally divided between the said Waskey and Eadie, after paying from such remainder all costs and expenses of mining and operating under *under* this agreement; the expense of first locating pay, however, to be borne solely by said Waskey.

In witness whereof, the said parties have hereunto set their hands and seals in triplicate, the day and year first above written.

J. POTTER WHITTREN.	[SEAL.]
ANDREW EADIE.	[SEAL.]
F. H. WASKEY.	[SEAL.]

Signed sealed and delivered in the presence of:

F. D. OVERFIELD.
F. E. FULLER.

DISTRICT OF ALASKA,
Cape Nome Precinct, ss:

This is to certify that on this 3 the day of August, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren, and F. H. Waskey, to me known and known to be the same person- described in and whose names are subscribed to the within instrument, and acknowledged that they
executed the same freely and voluntarily.

61 Witness my hand and notarial seal this 30th day of August, A. D. 1906.

F. E. FULLER,
Notary Public for Alaska.

[Endorsed:] No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Amended Answer of Def't Eadie. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. July 23, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. O. D. Cochran, Att'y for Defendant, Eadie. McB.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

VS.

ANDREW EADIE et al., Defendants.

Amended Answer of J. Potter Whittren to Plaintiff's Second Amended Complaint.

Comes now the defendant J. Potter Whittren, and by leave of Court first obtained, files this his amended answer to plaintiff's second amended complaint, and

I.

Denies each and every allegation in the said complaint contained, except only he admits that the said premises were duly located by this defendant in the year 1902.

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II.

And for a separate answer and defense to the said complaint this defendant alleges that he is the owner in fee and entitled to the possession of one undivided half part of the said Bon Voyage placer mining claim mentioned in the said complaint, and that he has been such owner and entitled to such possession ever since the first day of January, 1902; that on said date this defendant duly located and appropriated the said premises as a placer mining claim, and that ever since he has been in the possession thereof and entitled to such possession, except that on or about the 11th day of June, 1906, he demised and let the westerly 220 feet thereof to the defendant Waskey for a term of two years, and that since said time the said Waskey has been in the possession of the said portion of the said claim; and that the said defendants Waskey and Eadie have been in the possession of the remainder of the said mining claim since on or about the 20th day of June, 1906, under and according to the terms of an agreement for the working and mining of the said premises that day made by the defendants.

III.

And for a second further and separate answer to the said complaint, and by way of counterclaim, this defendant alleges:

1. That he is the owner in fee of an undivided half part of that certain placer mining claim known as the Bon Voyage, situate in the Cape Nome Recording District, Alaska, as the same is particularly described in the said complaint, and that he has been such owner and entitled to and in the actual possession of the same since the first day of January, 1902, under and by virtue of the due location and appropriation of the said premises as a placer mining claim made on the said day by this defendant; except that since on or about the 11th day of June, 1906, the de-

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fendant F. H. Waskey has been in the possession of the westerly 220 feet of the said mining claim under and by virtue of a lease thereof for the term of two years on that day made by the defendants, and that since on or about the 20th day of June, 1906, the defendants Andrew Eadie and F. H. Waskey have been in the possession of the remainder of the said mining claim under and according to the terms of an agreement for the working of the said portion for the term of two years after the said date.

2. That on or about the 20th day of July, 1906, the plaintiff caused to be filed and recorded in the office of the recorder of the Cape Nome Recording District, Alaska, a certain paper writing purporting to be a conveyance of an undivided half interest in the said mining claim from this defendant to the plaintiff, a copy whereof is hereto annexed, marked Exhibit "A;" and that ever since said 20th day of July, 1906, the plaintiff has claimed adversely to this defendant a half interest in the said mining claim, under and by virtue of the said alleged conveyance.

3. That the said paper writing, recorded as aforesaid, was
64 not, and is not, the deed or conveyance of this defendant, all of which was, and is, well known to the plaintiff; that the plaintiff wrongfully and fraudulently caused the said paper writing to be placed of record, well knowing that the same was fraudulent and void, and has ever since and now does claim some interest or estate in the said premises thereunder; but that the plaintiff has no claim, estate, or interest whatever in or to the said premises or any part thereof.

IV.

And for a third further and separate answer and partial defense to the said complaint, and by way of counterclaim, this defendant alleges:

1. That the plaintiff ought not to be permitted to allege that he is the owner — an undivided fourth interest in the said Bon Voyage mining claim or entitled to the possession thereof, or that he has been damaged by the withholding thereof by the defendants, because that on or about the 24th day of May, 1906, this defendant was the owner of the premises aforesaid and in the possession thereof and entitled to such possession, and on the said day the plaintiff duly made, executed, and delivered to this defendant an instrument in writing, signed by the plaintiff wherein and whereby the plaintiff duly acknowledged this defendant to be such owner and entitled to such possession, and promised and agreed to execute and deliver to this defendant, upon demand, a deed conveying unto this defendant the premises aforesaid.

65 2. That by reason of the premises the plaintiff is estopped from alleging that he is the owner of the said one-fourth interest in the said mining claim or entitled to the possession thereof or that the defendants are wrongfully withholding the same from him, or that he has been damaged in any sum whatever by the holding thereof by the defendants.

Wherefore, this defendant demands judgment that the said com-

plaint of the plaintiff be dismissed; that it be adjudged and decreed that this defendant is the owner of an undivided half part of the said premises, and that the plaintiff has no claim, estate, interest, or demand thereto or therein; that the said paper writing purporting to be a conveyance from this defendant to the plaintiff be adjudged and decreed not to be the deed of *the* this defendant, and that the same is void and of none effect, and that the plaintiff be forever barred and enjoined from asserting any claim, right, title, interest, or estate under the said paper writing in or to the said premises, or any part thereof; that, in case the said paper writing shall be considered the deed of this defendant, then the plaintiff be ordered and adjudged to execute and deliver to this defendant a good and sufficient deed conveying unto this defendant an undivided fourth part of the said mining claim; and that this defendant have such other and further relief as to the Court shall seem — and proper.

F. E. FULLER,

Attorney for Defendant J. Potter Whittren.

66

EXHIBIT "A."

#35972.

Know all men by these presents: That J. Potter Whittren, of Nome City, Alaska, the party of the first part, for and in consideration of the sum of One (\$1.00) Dollars, lawful money of the United States of America, to him in hand paid by J. J. Chambers of the same place, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the said party of the second part, his executors, administrators and assigns, an undivided one-half ($\frac{1}{2}$) interest in the following described property: Bench Claim known as the "Rocky Bench," opposite No. 2, in "Extra Dry," a tributary of Nome River, staked Jan. 1st, 1902.

The "Bon Voyage" Bench Claim on the left limit of Newton Gulch, opposite No. 3, above 1500 ft. to the southeast staked Jan. 1st, 1902.

No. $5\frac{1}{2}$ Little Creek, a tributary of Snake River, said $5\frac{1}{2}$ being a fraction at No. 5 below Discovery in Little Creek, all of the above being in Cape Nome Recording District, District of Alaska, and staked by J. Potter Whittren.

To have and to hold, the same to the said party of the second part, his executors, administrators and assigns, forever. And he does for his heirs, executors, administrators, covenant and agree to and with the said party of the second part, executors, administrators and assigns, to warrant and defend the sale of the said
67 property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, I have hereunto set my hand and seal the

21st day of April, in the year of our Lord one thousand, nine hundred two 1902.

J. POTTER WHITTREN. [SEAL.]

Signed, sealed and delivered in presence of

F. E. FULLER.

TERRITORY OF ALASKA,

Precinct of Nome, ss:

This is to certify, that on the 21st day of April, A. D. 1902, before me, F. E. Fuller, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came J. Potter Whittren, to me known to be the individual described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and Official Seal, the day and year in this certificate first above written.

F. E. FULLER,

Notary Public in and for the Territory of Alaska,

Residing at Nome.

Filed for record July 20, 1906—2 P. M. Request of J. J. Chambers.

F. E. FULLER, *Recorder.*

F. R. COWDEN, *Deputy.*

(Vol. 163, page 387.)

68 UNITED STATES OF AMERICA,

District of Alaska, Second Division, ss:

I, J. Potter Whittren being first duly sworn, say: That I am one of the defendants in the above-entitled action; that I have read the foregoing amended answer and know the contents thereof, and that I believe the same to be true.

J. POTTER WHITTREN.

Subscribed and sworn to before me this 23d day of July, A. D. 1907.

[NOTARIAL SEAL.]

F. E. FULLER,

Notary Public.

[Endorsed:] Original. No. 1629. District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Amended Answer of J. Potter Whittren. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jul. 23, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. F. E. Fuller, Attorney for ———, Nome, Alaska.

69 [Plaintiff's Reply to Amended Answer of J. Potter Whittren.]

In the District Court for the District of Alaska, Second Division.

No. —.

J. J. CHAMBERS, Plaintiff,

v.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

Reply.

Comes now the plaintiff in the above-entitled action and for the reply to the amended answer of the defendant J. Potter Whittren, filed on the 23d day of August, 1907, in the above-entitled cause and court, admits and denies as follows:

I.

For reply to paragraph No. II on page No. I of said amended answer, plaintiff denies each and every allegation contained in said paragraph and the whole thereof, except that plaintiff admits that on the 1st day of January, 1902, defendant Whittren duly located and appropriated said premises as a placer mining claim.

II.

70 For reply to the second, further and separate answer to said complaint by way of counterclaim, plaintiff denies each and every allegation contained in said defense and counterclaim and each paragraph of said answer and the whole thereof, except that plaintiff admits that said premises were duly located as a placer mining claim by said defendant on the 1st day of January, 1902.

Wherefore, plaintiff having fully replied to the answer of said defendant, prays judgment as he has heretofore prayed in his second amended complaint on file herein.

WM. A. GILMORE AND
C. D. MURANE,

Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Alaska, ss:

J. J. Chambers, being first duly sworn, upon his oath deposes and says:

I am in the plaintiff named in the foregoing action; I have read the foregoing reply, know the contents thereof, and the matters therein stated are true as I verily believe.

J. J. CHAMBERS,

Subscribed and sworn to before me this 7 day of August, 1907.
 [NOTARY SEAL.] C. D. MURANE,

*Notary Public in and for the District of
 Alaska, Residing at Nome, Alaska.*

[Endorsed:], No. 1629. In the District Court, District of Alaska,
 Second Division. J. J. Chambers, Plaintiff, v. Andrew Eadie,
 J. Porter Whittren and Frank H. Waskey, Defendants.

71 Reply to Amended Answer of Defendant Whittren. Filed in
 the Office of the Clerk of the Dist. Court of Alaska, Second
 Division, at Nome. Aug. 7, 1907. Jno. H. Dunn, Clerk. By
 ———, Deputy. ———, Attorneys for Plaintiff.

*[Plaintiff's Reply to Amended Answer of Andrew Eadie to Second
 Amended Complaint.]*

In the District Court for the District of Alaska, Second Division.

No. —.

J. J. CHAMBERS, Plaintiff,

v.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
 Defendants.

Reply.

Comes now the above-named plaintiff, J. J. Chambers, and for
 reply to the amended answer of the defendant Eadie to the second
 amended complaint of plaintiff admits, denies *as* alleges as follows:

I.

Plaintiff denies any knowledge or information sufficient to form
 a belief as to the allegations contained in Paragraph One of de-
 fendant's first, further and separate defense; in basing this denial
 upon said fact, denies each and every allegation contained in said
 paragraph.

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II.

For reply to the defendant Eadie's second separate answer and de-
 fense, plaintiff denies each and every allegation contained in Para-
 graph One of said affirmative defense.

III.

For reply to Paragraph Two of said separate defense, Plaintiff
 denies each and every allegation contained in said paragraph.

IV.

For reply to Paragraph Three of said affirmative defense, plaintiff
 denies each and every allegation contained in said paragraph and

the whole thereof, save and except that plaintiff admits that said claim is situate in the Cape Nome Recording District, District of Alaska, and that the instrument referred to in said paragraph designated as a "lease" is recorded in volume 164, page 138 of the records of said Recording District.

V.

Replying to Paragraph Four of said affirmative defense, plaintiff denies each and every allegation contained in said paragraph.

VI.

And replying to Paragraph Five of said affirmative defense, plaintiff denies each and every allegation contained in said paragraph and the whole thereof. Except plaintiff admits said defendant is in possession of said claim.

73 Wherefore, plaintiff having fully replied to the affirmative matter stated in said amended answer, prays judgment as he has heretofore prayed in his second amended complaint on file herein.

WM. A. GILMORE AND
C. D. MURANE,

Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Alaska, ss:

J. J. Chambers, being first duly sworn, upon his oath, deposes and says: I am the plaintiff named in the foregoing action; I have read the foregoing reply, know the contents thereof and the matters therein stated are true as I verily believe.

J. J. CHAMBERS,

Subscribed and sworn to before me this 7th day of August, 1907.

[NOTARIAL SEAL.]

C. D. MURANE,

Notary Public in and for the District of Alaska.

Service of the foregoing Reply accepted this 7th day of Aug., 1907.

O. D. COCHRAN,

Att'y for Eadie.

[Endorsed:] No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants. Reply to Amended Answer of Defendant Eadie. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Aug. 7, 1907. Jno. H. Dunn, Clerk By ———, Deputy. ———, At-rocneys for Plaintiff.

74 In the District Court, District of Alaska, Second Division.

No. —.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

Verdict.

We, the jury duly empaneled and sworn to try the above-entitled cause, find for the plaintiff and against the defendants, and that the plaintiff is the owner in fee and entitled to the possession of an undivided one-half interest in the Bon Voyage Claim, described as follows, to wit:

Commencing at the initial stake which is situated about 1500 feet in a southerly direction from the upper end line of Creek Claim No. 3 below on Newton Gulch, a tributary of Dry Creek, said stake being in the north end line of said claim; then 330 feet in a westerly direction and parallel to said Newton Gulch to corner stake No. 1; thence 1320 feet in a southerly direction and at right angles, to corner stake No. 2; thence 660 feet in an easterly direction to corner stake No. 3; thence 1320 feet in a northerly direction to corner stake No. 4; thence 330 feet to initial stake or place of beginning; said claim being situated on the divide known as Gold Hill, between Newton Gulch and Nome River, and next to a certain Bench Claim known as Gold Hill Claim No. 1, and containing about twenty acres of placer mining ground.

75 And we further find that the plaintiff is entitled to damages against the defendants, Andrew Eadie, J. Potter Whittren, and Frank H. Waskey in the sum of \$20441.83—Twenty thousand, four forty-one 83/100 Dollars.

Dated this 3d day of September, 1907.

FLOYD W. DAVIS, *Foreman.*

[Endorsed:] #1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants. Verdict. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sep. 3, 1907. Jno. H. Dunn, Clerk. By ———, Deputy.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE et al., Defendants.

Motion for New Trial.

Now come the defendants and move the Court to vacate
76 and set aside the verdict found and returned herein on the
3d day of September, 1907, in favor of the plaintiff and
against the defendants, and to grant defendants a new trial herein
for the following causes materially affecting the substantial rights
of the defendants:

I.

Because the evidence was insufficient to justify said verdict and
because the verdict is against law.

II.

Because of the following errors in law occurring at the trial and
duly excepted to by the defendants:

1. That the Court erred in holding that no alteration was ap-
parent on the face of Plaintiff's Exhibit No. 1.

2. That the Court erred in admitting the instrument designated
as Plaintiff's Exhibit No. 1 in evidence without explanation by the
plaintiff of the alteration apparent upon its face.

3. That the Court erred in admitting in evidence Plaintiff's Ex-
hibit No. 1 without proof of its execution.

4. That the Court erred in holding that said instrument was duly
executed under the laws of the District of Alaska.

5. That the Court erred in holding that a lease of a mining claim
is not evidence of an interest in real property.

6. That the Court erred in denying the offer of the defendants,
Eadie and Waskey, to show that they held possession of the premises
as innocent bona fide purchasers for a valuable consideration,

77 and without any notice of any claim or right on the part of
the plaintiff.

7. That the Court erred in sustaining plaintiff's objections to de-
fendant's offer to show in the presence of the jury that alterations
on a written instrument similar to those apparent on Plaintiff's
Exhibit No. 1 could be made by acids and chemicals.

8. That the Court erred in refusing defendant's offer to show that
writings could be wholly erased by means of chemicals.

9. That the Court erred in refusing defendant's offer to show that
writings could be wholly erased by means of acids.

10. That the Court erred in refusing to give the instructions re-
quested by defendant Whittren to the effect that it was conceded
by all the parties that Plaintiff's Exhibit No. 1 had been altered in
material parts since the date of its execution and acknowledgement,

and that such alteration was apparent on the face of the instrument.

11. That the Court erred in refusing to instruct the jury as requested by defendant Whittren, that a party producing a writing as genuine which has been altered, or appears to have been altered, after its execution or making in a part material to the question in dispute shall account for the appearance or alteration.

12. That the Court erred in refusing to instruct the jury as requested by defendant Whittren that if they should find that the plaintiff had shown by a preponderance of evidence that the
78 *that the* alteration was made by or with the consent of the defendant, Whittren, that they might consider the said instrument as evidence of the plaintiff's title to the premises claimed, but not otherwise.

13. That the Court erred in giving instruction numbered 2 to the jury.

14. That the Court erred in giving instruction numbered 3 to the jury.

15. That the Court erred in giving the following part of instruction numbered 4 to the jury: "You are instructed that a change or alteration in a duly executed deed of conveyance made by a grantor, or with his consent, after a delivery of the same and when it has once become operative, does not make the deed void; therefore, I instruct you, gentlemen of the jury, if you believe from all the evidence in this case that the defendant Whittren made a change in the instrument offered in evidence by the plaintiff, whereby the quantity of interest going to Chambers was reduced from a three-quarters interest to a one-half interest, or if you believe the said change was made with Whittren's consent, then I instruct you that the said deed remains valid in its changed or altered form, and if you further find that it was, as changed and purporting to convey the undivided one-half of said claim, delivered to the plaintiff by defendant Whittren, you must then find the plaintiff to be the owner in fee and entitled to the possession of an undivided one-half interest in the said claim, together with damages computed according to the rule hereinbefore stated."

79 16. That the Court erred in instructing the jury that a lease for a term of years under the Alaska Code was not a conveyance of real land or *deal* property such as under the circumstances of this case would raise a question of priority of record between a deed from Whittren and the leases from him to Waskey and to Waskey and Eadie.

17. That the Court erred in giving instruction numbered 5 to the jury.

18. That the Court erred in giving the following portion of Instruction numbered 6 to the jury: "You are instructed, gentlemen of the jury, that where a lessee takes a lease from a lessor who has no title to the ground leased, the lessee acquires no interest in the ground by reason of the lease."

19. That the Court erred in giving the following portion of Instruction numbered 6 to the jury: "So if you find that the plaintiff

is the owner in fee of an undivided one-half interest in the said Bon Voyage Placer Claim by reason of a conveyance from the defendant Whittren, dated April 21st, 1902, originally of the undivided three-fourths thereof, now of the undivided one-half thereof, then I instruct you that the defendants Eadie and Waskey have no lease on the said undivided one-half interest in said claim, nor has Waskey alone any lease which is of any legal force and effect as against the plaintiff, but the plaintiff must, regardless of said leases, recover possession of his full undivided one-half interest in the said claim and damages as hereinbefore and hereinafter stated."

80 20. That the Court erred in giving the following portion of Instruction numbered 7 to the jury: "If the plaintiff then, in this case, has accounted for the alteration in the deed upon which he founds his right of recovery by showing by a preponderance of evidence that the alteration was made by the defendant Whittren, or with his consent, then the plaintiff will be entitled to a verdict at your hands for the undivided one-half of the premises in the controversy, and damages."

21. That the Court erred in giving Instruction numbered 8 to the jury.

22. That the Court erred in giving the following portion of Instruction numbered 9 to the jury: "You are also instructed that the question of abandonment is not an issue in this case, and any testimony introduced tending to show an abandonment by the plaintiff of any rights theretofore claimed by him, should not be considered by you for that particular purpose."

23. That the Court erred in giving the following portion of Instruction numbered 11 to the jury: "Now I add as a final special instruction for your guidance that if you find for the plaintiff you will find for the undivided one-half of the Bon Voyage Claim in Controversy against all the defendants."

IRA D. ORTON,

ALBERT FINK,

Att'ys for Deft. Waskey.

O. D. COCHRAN,

Att'y for Defts. Eadie and Whittren.

F. E. FULLER,

Attorneys for Defendant Whittren.

81 Service of the foregoing motion and receipt of copy admitted this 6th day of September, 1907.

C. D. MURANE AND

WILLIAM A. GILMORE,

Attorneys for Plaintiff.

[Endorsed:] No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Motion for New Trial. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Sept. 6, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. O. D. Cochran, Att'y for Defendants.

In the District Court for the District of Alaska, Second Division.
No. 1629.

J. J. CHAMBERS
vs.
ANDREW EADIE et al.

Order Overruling Motion for New Trial.

This cause came regularly to be heard on September 21, 1907, upon defendant's motion for a new trial, the same having been submitted by counsel without argument, and the Court being fully advised in the premises, after giving careful consideration to
82 all the causes set forth in the motion, orders that the said motion be, and the same is hereby, overruled.

ALFRED S. MOORE,
District Judge.

Nome, Alaska, October 4th, 1907.

[Endorsed:] No. 1629. In the United States District Court for the District of Alaska, Second Division. J. J. Chambers vs. Andrew Eadie et al. Order Overruling Motion for New Trial. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 5, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. Vol. 5 Orders and Judgments, p. 490. Comp. McB.

In the District Court for the District of Alaska, Second Division.
No. ———.

J. J. CHAMBERS, Plaintiff,
vs.
ANDREW EADIE, J. POTTER WHITTREN and FRANK H. WASKEY,
Defendants.

Judgment.

This cause having come on for hearing in the above-entitled court on the 26th day of August, 1907, the parties appearing in person and by their respective attorneys, a jury having been duly and regularly empaneled and sworn to try said cause, and
83 after hearing the testimony introduced by plaintiff and defendants, the arguments of counsel for plaintiff and defendants, and the instructions of the Court, retired to deliberate upon their verdict, and, subsequently, *retired* into court with the following verdict:

"We, the jury duly empaneled and sworn to try the above-entitled cause, find for the plaintiff and against the defendants, and

that the plaintiff is the owner in fee and entitled to the possession of an undivided one-half interest in the Bon Voyage Claim, described as follows, to wit:

"Commencing at the initial stake which is situated about 1,500 feet in a southerly direction from the upper end line of Creek Claim No. 3 Below, on Newton Gulch, a tributary of Dry Creek; said stake being in the north end line of said claim; thence 330 feet in a westerly direction and parallel to said Newton Gulch to corner stake No. 1; thence 1320 feet in a southerly direction and at right angles, to corner stake No. 2; thence 660 feet in an easterly direction to corner stake No. 3; thence 1320 feet in a northerly direction to corner stake No. 4; thence 330 feet to initial stake or place of beginning; said claim being situated on the divide known as Gold Hill, between Newton Gulch and Nome River, and next to a certain Bench Claim known as Gold Hill Claim No. 1, and containing about twenty acres of placer mining ground.

"And we further find that the plaintiff is entitled to damages against the defendants, Andrew Eadie, J. Potter Whittren
84 and Frank H. Waskey, in the sum of \$20,441.83, twenty thousand, four forty-one 83/100 dollars.

"Dated this 3d day of September, 1907.

"FLOYD W. DAVIS,

"Foreman."

Thereafter, the said defendants, by their attorneys, filed a motion for a new trial to set aside the verdict of the jury, which said motion was submitted to the Judge of the above-entitled court, and was by the Court, prior to this date, overruled and denied;

And, whereas, heretofore, under a stipulation signed by the attorneys for the respective parties, the following order was made by the Court:

"On reading and filing the foregoing stipulation, it is hereby ordered that the Miners and Merchants Bank of Alaska be authorized to *cuase* the gold-dust deposited with it subject to the order of the Court in this action to be melted, assayed and shipped to the Assay Office in Seattle, Washington, and the said bank is hereby directed to hold the proceeds thereof, less the usual charges, subject to the order of the court."

Dated Nome, Alaska, June 5th, 1907.

ALFRED S. MOORE,

Judge District Court, District of Alaska, Second Division.

Now, therefore, by reason of the law and premises it is hereby ordered and adjudged that the plaintiff is the owner in fee and entitled to the possession of an undivided one-half ($\frac{1}{2}$) interest of, in and to that certain placer mining claim *sintate* in the Cape Nome
85 Recording District, District of Alaska, known and named the Bon Voyage Claim, particularly described as follows, to wit:

Commencing at the initial stake, which is situated about 1,500 feet in a southerly direction from the upper end line of Creek

Claim No. 3 Below, on Newton Gulch, a tributary of Dry Creek, said stake being in the north end line of said claim; thence 330 feet in a westerly direction and parallel to said Newton Gulch to corner stake No. 1; thence in a southerly direction and at right angles to corner stake No. 2; thence 660 feet in an easterly direction to corner stake No. 3; 1320 feet in a northerly direction to corner stake No. 4; thence 330 feet to the initial stake or place of beginning; said claim being situated on the divide known as Gold Hill, between Newton Gulch and Nome River, and containing about twenty acres of placer mining ground. And that said defendants are not the owners or entitled to the possession of said interest in said claim, or any part thereof, and that plaintiff has been damaged by said defendants Andrew Eadie, J. Potter Whittren and Frank H. Waskey by the withholding of possession of said premises from plaintiff and extracting gold therefrom, and it is further ordered and adjudged that plaintiff have and recover of and from said Andrew Eadie, J. Potter Whittren and Frank H. Waskey, and each of them, judgment in the sum of Twenty Thousand, Four Hundred and Forty-one Dollars and Eighty-three cents (\$20,441.83), and the costs and disbursements of this action.

86 It is further ordered and adjudged that the Miners and Merchants Bank pay into the registry of this court to the clerk thereof, to be applied upon the foregoing judgment, the proceeds of the gold-dust melted and assayed under the order of this Court hereinbefore set out, and that execution may issue to carry this judgment into effect.

Done and dated in open court on this 12th day of October, 1907.

ALFRED S. MOORE,

Judge District Court, District of Alaska, Second Division.

[Endorsed:] No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Judgment. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 12, 1907. Jno. H. Dunn, Clerk. By —, —, Deputy. —, —, Attorneys for Plaintiff. Vol. 5, Orders and Judgments, p. 499. Comp. J. D. 2, page 40.

87 In the United States District Court in and for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

Bill of Exceptions.

Be it remembered, that the above-entitled action came on for trial in Nome, Alaska, on the 26th day of August, 1907, at a Special

Term of the above-entitled court, regularly called and held in the town of Nome, District of Alaska, before the Honorable Alfred S. Moore, Judge of the above-entitled court, sitting with a jury.

C. D. Murane, and W. A. Gilmore, Esquires, appeared for the plaintiff.

F. E. Fuller and O. D. Cochran, Esquires, appeared for the defendant J. Potter Whittren. O. D. Cochran, Esquire, appeared for the defendant Andrew Eadie. Ira D. Orton and Albert Fink, Esquires, appeared for the defendant Frank H. Waskey.

88 Thereupon, a jury having been duly and regularly empaneled and regularly sworn to try the above-entitled action, the following proceedings were had and testimony taken, to wit:

Ira D. Orton, Esq., requested that the Court instruct the jury in writing, which the Court then and there consented to do, and thereupon, it was then and there stipulated by and between the attorneys for the plaintiff and defendants, that any and all objections and exceptions made or taken by any of the attorneys for the defendants, might be considered as made and taken by all the defendants.

And thereupon, W. A. Gilmore, Esq., on behalf of the plaintiff offered in evidence a certain paper writing together with an acknowledgment thereof, which said paper writing was in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT No. 1.

Deed.

Whittren
to
Chambers.

Know all men by these presents: That J. Potter Whittren, of Nome City, Alaska, the party of the first part, for and in consideration of the sum of One (\$1.00) Dollars lawful — of the United States of America, to him in hand paid by J. J. Chambers, of the same place, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, and undivided one-half ($\frac{1}{2}$) interest in the following described property: Bench Claim known as the "Rocky Bench" opposite No. 2, in "Extra Dry," a tributary to Nome River, staked Jan. 1st, 1902. The "Bon Voyage" Bench Claim
89 on the left limit of Newton Gulch opposite No. 3, about 1500 ft. to the southeast, staked Jan. 1st, 1902. No. 5 $\frac{1}{2}$ Little Creek, a tributary to Snake River, said 5 $\frac{1}{2}$ being a fraction at No. 5, below Discovery in Little Creek, all of the above being in Cape Nome Recording District, District of Alaska, and staked by J. Potter Whittren.

To have and to hold the same to the said party of the second part, his executors, administrators and assigns forever. And he does for

his heirs, executors, administrators covenant and agree to and with the said part- of the second part, executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all any every persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, I have hereunto set my hand and seal the 21st day of April in the year of our Lord one thousand nine hundred two, 1902.

J. POTTER WHITTREN. [SEAL.]

Signed, sealed and delivered in presence of
F. E. FULLER.

TERRITORY OF ALASKA,
Precinct of Nome, ss:

This is to certify that on the 21st day of April, A. D. 1902, before me, F. E. Fuller, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came J. Potter

Whittren, to me known to be the individual described in
90 and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.]

F. E. FULLER,
*Notary Public in and for the Territory of
Alaska, Residing at Nome.*

And the said paper bore the following endorsement:

"35972. Bill of Sale. Prepared by Crawford & Whittren, Mining Brokers, Nome, Alaska. From J. Potter Whittren to J. J. Chambers. Dated —, 190—, Territory of Alaska, District of —, ss: Filed for record at request of J. J. Chambers, Jul. 20, 1906, on the — day of —, at — minutes past 2 P. M., and recorded in volume 163 of Deeds, page 387, Records of Nome, District, Alaska. F. E. Fuller, Recorder, by F. R. Cowden, Deputy. 4-3-\$2.85."

NOTE—The endorsements on said paper writing were expressly reserved from the offer.)

And thereupon the defendants made the following objections to the introduction of said paper writing:

First. That said paper writing was incompetent, irrelevant and immaterial.

Second. That said paper writing showed on its face that it had been altered in a material part by the use of chemicals or acids, to wit, in the words expressing the amount of interest conveyed, which said alteration had not been explained.

91 Third. That the execution of said paper writing had not been proved.

Fourth. That said paper writing was not a conveyance of real estate under the laws applicable to the District of Alaska, in that it was not witnessed by two witnesses.

Fifth. That said paper writing was not executed in the presence of two witnesses, as required by the laws of the United States applicable to the District of Alaska, for conveyances of real property.

Which said objections upon the part of the defendants were overruled by the Court, to which ruling of the Court each of the defendants then and there excepted, which exceptions were allowed; and thereupon the said paper writing was marked Plaintiff's Exhibit No. 1, and read in evidence to the jury; and thereupon plaintiff offered in evidence the endorsements upon said paper writing marked Exhibit No. 1, which said endorsements were in words and figures, as follows, to wit:

PLAINTIFF'S EXHIBIT No. 2.

Endorsement on Deed: Whittren to Chambers. 35972. Bill of Sale. Prepared by Crawford & Whittren, Mining Brokers, Nome, Alaska. From J. Potter Whittren to J. J. Chambers. Dated —, 190—, Territory of Alaska, District of —: Filed for record at request of J. J. Chambers, Jul- 20, 1906, on the — day of — at — minutes past 2 P. M., and recorded in volume 163, of Deeds, Page 387; Records of Nome District, Alaska. F. E. Fuller, Recorder, by F. R. Cowden, Deputy. 4-3-\$2.85.

Whereupon the defendant Waskey made the following objections to the introduction of the aforesaid endorsements:

First. That said endorsement was irrelevant, incompetent and immaterial.

Second. That said endorsement was contained upon the back of a paper writing, a material part of which had been altered, and which alteration had not been explained.

Third. That the execution of the original instrument bearing the said endorsement had not been proved.

Fourth. That the original instrument bearing the aforesaid endorsement was not a conveyance of a real property under the laws of the District of Alaska, in that it was not witnessed by two witnesses as required by law.

Fifth. That said endorsement was contained or written upon the back of a paper writing or deed which was not executed in the manner required by law so as to entitle it to be recorded in this: that said paper writing or deed was not witnessed, and did not purport to be witnessed, by two witnesses.

Sixth: That the original instrument containing the aforesaid endorsement on the back thereof was not entitled to record, inasmuch as the same was not witnessed by two witnesses, and therefore any recordation of said instrument was void as to the defendant Waskey and no legal notice to him.

93 And thereupon, Mr. F. E. FULLER was called and duly sworn and testified as follows, to wit:

My name is F. E. Fuller; I am Commissioner of the Cape Nome Precinct, and as such have charge of the records of the Cape Nome Precinct, and am ex-officio Recorder. I have been Recorder since July 1st, 1906. I note the file marks on the back of Plaintiff's Exhibit Number One. I know F. R. Cowden. He is Deputy Recorder. I am familiar with his signature. This is his signature on the back of this instrument Exhibit Number One. The signature above his is my official signature. When instruments are brought to the office for recordation, the Deputy Recorder receipts for them. Mr. Cowden, as such Deputy Recorder, is authorized to stamp my signature on instruments when received for record in my office. The instrument I hold in my hand was recorded in my office.

No cross-examination.

Whereupon F. R. COWDEN, was called by the plaintiff, and being duly sworn, testified as follows:

My name is F. R. Cowden. My official position is that of Deputy Recorder of the Cape Nome Precinct. I was occupying that position on the 20th day of July, 1906. I am acting under Judge Fuller. I note the file marks on the back of the Plaintiff's Exhibit Number One. That is my signature. This instrument was recorded in volume 163, page 387, on July 20th, 1906, at 2 P. M. I made the memorandum recorded on the back of this instrument.

94 Whereupon the Court overruled the objections of the defendants to the introduction of the aforesaid endorsements on the back of the aforesaid Exhibit Number One, to which ruling of the Court, the defendants, and each of them, excepted then and there, which exception was by the Court allowed, and thereupon the aforesaid filing marks on the back of Plaintiff's Exhibit Number One were received in evidence, marked Plaintiff's Exhibit Number Two and read to the jury.

Thereupon a book was handed to Mr. Cowden, who continued to testify as follows:

I know what book this is. It is a record of deeds of the Cape Nome Mining District, Volume 163. This is the book in which the instrument, Plaintiff's Exhibit Number One, is recorded at pages 387, 388 and 289.

Whereupon pages 387, 388 and 389 of said book were offered in evidence. Whereupon defendants asked permission of the Court to renew all their former objections of the introduction of this evidence without re-stating them, which request was allowed by the Court, and thereupon, defendants renewed all their former objections, which objections were, by the Court overruled to which ruling of the Court, the defendants and each of them then and there excepted, which exceptions were by the Court allowed, and thereupon, pages 387, 388 and 389 of Volume 163 of the Records of Deeds of

95 the Cape Nome Recording District, District of Alaska, were received in evidence, marked Plaintiff's Exhibit Number Three and read to the jury; said pages being in the same words and figures as the Exhibit hereinbefore set forth as Plaintiff's Exhibit Number One.

Whereupon the plaintiff requested the Court for leave to substitute for the original volume and pages therein a certified copy of pages 387, 388 and 389, which request, the Court, then and there, permitted.

And thereupon the defendant ANDREW EADIE was called as a witness by the plaintiff, and having been first duly sworn, testified as follows, to wit:

My name is Andrew Eadie. I am a defendant in this lawsuit. I was not present at the times when gold was removed from the Bon Voyage claim up to the close of navigation 1906. I never took and gold personally from the claim, but I have seen it cleaned up. I never received any gold from the Bon Voyage claim during the year 1906, though I received some money, the proceeds of some of the gold. As near as I can recollect at the present time, it was in the neighborhood of \$3,000.00. I cannot give the exact figure. I do not know whether the banks in Nome have a correct record of the money received by me personally up to October 15th, 1906, or not. Of the \$3,000.00, I received, I got part from Mr. Crabtree and part from Mr. Waskey. Mr. Crabtree was Mr. Waskey's representative. I do not know how much Mr. Waskey got from Mr.

96 Crabtree during the year 1906, up to the 15th day of October, 1906, that is, I do not know exactly. I think Mr. Waskey had probably about \$11,000.00, or a little over \$11,000.00. Somewhere near that amount. I do not remember what Whittren got. I was not dealing with Whittren myself. I do not know whether he got \$3,000.00, or not. I never personally saw him get any money. Whittren never told me how much he got. He never told me that he got some money from the claim. I never asked him the question. It was nothing to me what he got. Since October 15th, 1906, I have received from the Bon Voyage about three thousand dollars. I got it from Mr. Crabtree. I presume the claim has cleaned up in the neighborhood of \$75,000.00, up to the present time, all of which has been taken out by the defendants. I know there is a certain amount on deposit by order of the Court here, which was to be put away in one of the banks. I cannot say much in regard to that only I know there was so much to be put away in one of the banks. I do not know exactly what it is. I know it is somewhere in the neighborhood of \$14,000.00, or \$15,000.00; something like that. Whittren has not received any money from the Bon Voyage this year. As a matter of fact, the mine did not produce a great deal more than \$75,000.00. \$75,000.00 is all that shows on the books from the time they started. I went over the books myself. That was the gross output. I am speaking now of the books showing the result of the work from June, 1906, up to the present time.

97 I had a man expert the books, and I went over the books with him. His name was T. P. S. Norris. He is not in Nome

now. He has gone away up to York, I believe. The books were in Waskey's office in the possession of the bookkeeper, I presume. I am not acquainted with the bookkeeper. I do not even know his name. He used to be in the Beau Mercantile Company; that is about all I know about him. They were kept down at the Beau Mercantile Company, I think. The books were kept in a separate safe by themselves at the Beau Mercantile Company. That is all I know. I do not know in whose possession they were kept, but I know they were kept in a separate safe by themselves. The books correctly show the gross output from the Bon Voyage claim from the time they went to work in 1906 up to the present time, so far as I know. I was willing to settle my interest on that basis with my co-lessees. I do not know of any gold that was taken or extracted from the Bon Voyage claim by any of the defendants except what is shown on these books. I do not know of any gold, or the proceeds from any gold taken from the Bon Voyage Claim by the defendants or any of them, either jointly or individually from the 1st day of June, 1906, up to the present time, other than what is shown from these books.

Cross-examined by Mr. ORTON:

I know that 25% of the gross output of this mine was deposited subject to the order of this court and was not received by Mr. Waskey. I stated that he got the balance of the \$75,000.00, but
98 I was mistaken about that. Twenty-five per cent of that was received by Mr. Waskey as a matter of fact, but it was deposited subject to the order of the Court. I testified that Mr. Waskey and myself had taken gold out of the Bon Voyage claim. I happened to be working out there because I am one of the owners of the claim. Mr. Waskey was working out on this claim by virtue of a lease given by myself and Potter Whittren. It is the same Mr. Whittren from whom Dr. Chambers has introduced a deed in evidence. The gold which Mr. Waskey and myself extracted was taken out under the leases just referred to.

Redirect examination by Mr. GILMORE:

The \$15,000.00, deposited in the bank is, I think, one-fourth of the total amount taken out this year, though I do not think there is \$15,000.00, in the bank. You will have to ask some one who knows the exact amount. I mean that was 25 per cent of the amount that was sluiced up this spring. Some of the gold was taken from the ground prior to the first of this year. Taken out of the ground and deposited on the dump, and just sluiced up since the opening of navigation. That is what I mean when I speak of what was taken out this spring. The \$15,000.00, or whatever amount is down in the bank, represents one-fourth of what was sluiced up this spring.

99 J. J. CHAMBERS, the plaintiff, was called as a witness by plaintiff, and, having been duly sworn, testified as follows:
I am the plaintiff in this law suit. I know where the Bon Voyage

claim is, the property in dispute. The defendants in this action have been working and mining that property. I have had access to the defendants' books. I was referred to them by Mr. Crabtree, the representative of Mr. Waskey. It was by the order of the Court that I was referred to them by Mr. Crabtree. I made an examination of the books of the defendants about the 1st of March. That was the last time I saw the books. I saw the assay receipts from the bank showing the amount of gold taken from the claim from the 1st of August to the 15th of October, 1906. I have inspected the cleanups since then. I know the total gross amount of money extracted since then. I know the total gross amount of money extracted this spring. I have seen fifty-nine thousand eight hundred and some dollars—I do not remember the exact amount—extracted. That was washed up and weighed some time about the 1st of May, 1907, and I think, extended up to the 11th or 12th.

Cross-examination by Mr. ORTON:

I arrive at this value by figuring the gold at the ratio shown by the assay returns. I don't remember just what the rate was now. I got it from the Miners and Merchants Bank assayer, and I do not remember now what it was.

100 Whereupon, the defendant, J. POTTER WHITTREX, was called by the plaintiff, and, after having been duly sworn, testified as follows:

I am one of the defendants in this action. I do not remember the exact amount of money that I have received from the Bon Voyage claim since the 1st of June, 1906. I could not give the exact amount. It was in the neighborhood of between two and three thousand dollars. I think it was \$2,200.00, but I do not remember just exactly. I do not know what Mr. Eadie received. I do not know if Mr. Eadie received \$3,000.00. I would not swear that he did not get more than that, but I am pretty sure he did not get \$3,000.00. I would not swear positively, but I am pretty sure he did not.

Cross-examination by Mr. COCHRAN:

I think all the figures I had were turned over to Mr. Fuller last fall. I do not know whether he has them still or not. If there are any he has them in his possession. I left them all with him when I left the country last fall. I will try and get the exact figures.

Whereupon the plaintiff rested.

And thereupon the defendants called the plaintiff, J. J. CHAMBERS, to the witness-stand, who, having been duly sworn, testified as follows, to wit:

I am the plaintiff in this action. I recognize the instrument which you now hand me marked Plaintiff's Exhibit Number One.
101 I am the grantee therein. That deed is not in the same condition it was when it was executed. That is, it is not in the same condition as it was when I first got it on April 21, 1902. It had

not been changed then. That date was changed on the 23d day of May, or the 24th day of May, 1906. I am not sure which.

Question. Now, I will ask you whether at the time the deed was originally executed, the words "one-half," written out and the figures " $\frac{1}{2}$ " in figures, occurring in the conveying clause, or following the conveying clause, was in this deed when it was originally executed by J. Peter Whittren?

Answer. No.

Cross-examination by Mr. GILMORE:

Question. Referring to the change, concerning which counsel asked you on your direct examination, Dr. Chambers, I will ask you now to state who made that change in that instrument, Plaintiff's Exhibit Number One?

Answer: J. Potter Whittren made the change in that instrument. I saw him make it. I know the handwriting in the words "one-half," the words which are written in that instrument. That is J. Potter Whittren's handwriting. I saw him write it. That much was made by Whittren in my presence, at the time I have testified to by mutual consent between Mr. Whittren and myself, and it was made on the 23d or 24th of May, 1906. It was changed from three-quarter interest to a one-half interest. The deed originally called for three-fourth interest and it was changed at that time to one-half interest. The deed was re-delivered to me by Mr. Whittren after this change was made. He handed it to me and I have had it in my possession ever since, except when I sent it up to be recorded.

Whereupon the following proceedings were had:

Mr. FINK: We now move the Court to strike from the testimony in the case the deed introduced by plaintiff in their case in chief, being Plaintiff's Exhibit Number One, on the ground that it now appears from the uncontradicted testimony in the case that the deed introduced in evidence is not witnessed as required by law, or acknowledged as required by law.

Mr. MURANE: We oppose that motion.

The COURT: The date of the acknowledgement of the deed as it appears on its face is 1902. It certainly is not acknowledged as it now stands.

Mr. MURANE: Where a change is made by the mutual consent of the parties thereto, no new acknowledgement is necessary, the deed takes effect the same as though no change had been made. In fact, any alteration in a deed showing a less amount of property conveyed, it has absolutely no effect at all as bearing upon the validity of the deed.

The COURT: I guess the grantor cannot complain anyway. We overrule the motion.

To which ruling of the Court the defendants then and there excepted, which exception was by the Court allowed.

103 Whereupon, the following proceedings were had, to wit:

Mr. FINK: We now move to strike from the record the deed introduced in evidence on the ground that the same is neither witnessed or acknowledged, and on the further ground that it now appears from the uncontradicted testimony in the case that the deed has been altered in a material portion four years after the same was acknowledged.

The COURT: Motion overruled.

To which ruling of the Court the defendants then and there excepted, which exception was by the Court allowed.

Whereupon, the following proceedings were had, to wit:

Mr. FINK: We now move to strike from the record the alleged acknowledgement of this deed, Plaintiff's Exhibit Number One, on the ground and for the reason that it now appears from the uncontradicted testimony in the case that it is not an acknowledgement of the deed now introduced in evidence, the evidence being that the deed introduced in evidence was delivered four years after the acknowledgement on the same.

The COURT: Motion overruled.

To which ruling of the Court the defendants then and there excepted, which exception was by the Court allowed.

104 Whereupon the plaintiff, J. J. CHAMBERS, was recalled by the defendants for further examination, and testified as follows, to wit: I testified before that I have had this deed in my possession since the 21st day of April, 1902. The deed is in J. Potter Whittren's writing. I have no deeds at the present time in my possession that I have written myself. I say that Whittren wrote the words "one-half" in this deed. Whittren made this alteration in the body of this instrument. I saw him write that line. That writing there. I say that J. Potter Whittren wrote that figure 2. I have been engaged in the practice of medicine since 1884, but since I have been here, I have been looking after my mining interests. I have a certain amount of knowledge concerning chemistry and chemicals, at least above the ordinary miner. I do not know what kind of chemicals are used in taking from instruments ink marks. I have no idea. I studied medicine about four years at the time I first studied, and have taken a few post-graduate courses in this country and Europe since. I do not know what acids are used in removing ink marks from instruments. I have not had much practice in that kind of business, though I have seen it used twice in my office in Seattle, 602 Alaska Building. The first time was in the fall of 1905. I think it was. A man by the name of Frank Kellerher, from Chicago, a lawyer friend of mine from Chicago. He had been buying up some oil lands in California, and came into my office one morning in a
105 hurry and wanted to know if I had some ink eraser, or something of that kind: I think he said he wanted to make some erasures on some papers, and was in a big hurry, he had only stopped over in Seattle for a short stay, and wanted to get out as quick as possible, and I think he went down to Lowman & Hanford's and came right back and removed some markings and made some changes

in some legal documents—took out something in some part, made some changes, something he wanted done in a big hurry, whatever it was, and he went away and left this ink erasing fluid—stuff—in my office.

Mr. FINK: He was a lawyer friend of yours from Chicago, you say?

Answer. Yes, he was a big lawyer from Chicago. He used to be in Circle City 11 years ago, and an old friend of mine. We were quite intimate friends in the early days at Circle. He was from Alaska; he used to be in Alaska, at Circle City. I never paid much attention to it at the time he left it there, and it just staid there where he left it. I never paid much attention to it. He had left it there and it stayed there on my desk, as it is there to this day for all I know. I think it is light colored stuff. I never paid much attention to it. I do not know what the ingredients are, acids or alkali. I don't know, I don't know. I never tested them. It is light color. It might be either alkali or acid from their appearance from all that I know about them. Whittren changed this deed between either

the 23d or 24th of May. I think the 23d, most likely—the
106 23d of May, 1906. I have not had the deed in my possession since the hearing upon the injunction had in this court in this case last fall. I have had it locked up in the safety deposit vault, with the exception of taking it out a few times. Except, as I have said, it has been down in the vault. That is, there has no one else had access to it but myself and I have only had it out a few times since I put it down there the first time. I produced it at court at the time of the hearing upon the injunction. The instrument has not been changed since then.

Whereupon the witness was handed a glass and asked to examine the instrument carefully, and particularly the words, "one-half," to ascertain whether or not a change had been made since the hearing upon the application for an injunction, whereupon, the witness, after examining the writing, continued as follows:

No, they are just identically the same as they were, for all I can say. I cannot see any difference in them. No change whatsoever has been made. I have had that deed in my possession, that is, locked up in the safety vault ever since last fall, that is since this case was passed upon in that injunction hearing, and I know that no change has been made in it. I know that I made no change in it and I know that nobody else has had any opportunity to make any changes. I have made no changes and nobody else has made any changes in it, because it has been in my possession all the

107 time. The deed was present in the court at the time of the hearing upon the injunction in this case. I do not remember whether or not my attorneys at that time claimed that the instrument showed upon its face that it had been originally three-quarters.

Whereupon, J. POTTER WHITTREN, one of the defendants in the above-entitled action, was produced on behalf of the defendants, and being duly sworn, testified as follows, to wit:

I am one of the defendants in this case. I have lived in Nome since 1900, that is, on the Seward Peninsula. I first came to Nome in June, 1900. My first business here was mining, from that spring up until 1903, when I ceased to take any active part, because at this time, I was appointed a Deputy Mineral Surveyor. I know Dr. Chambers, the plaintiff, quite well and have known him since 1897. I first knew him in Dawson, but had no business relations with him there. I knew him also in Nome; we came in on the same boat in June, 1900, from Seattle. I had no business relations with him at that time. Later on in the year 1900, I brought in a large outfit from Seattle, mining supplies and so forth, and I was waiting here trying to get a place—I was living in a cabin down here—or rather a frame tent, the only place I could get at that time—places were pretty scarce those days, and I heard of the Bluestone strike; Doc

and I were discussing it, as we sat in the tent there, and I
 108 said if it didn't cost so much to get the outfit up there that I believed I'd go; that there didn't seem to be much of a chance of getting in here. He said that if I would go, he would pay the freight on the outfit, if I would stake him in for a half interest in anything I staked in the country. He said, "How quick could you go, do you think?" I told him that there was a steamer, the "Saidie," I think, going that night; that was about eleven o'clock at night so I made my arrangements to get away that night. I gave him an agreement that I would stake him in for a half interest for anything I staked in that country during the year, 1900. That was a written contract, and Dr. Chambers has it.

Mr. COCHRAN: Will you produce that contract, Dr. Chambers?
 (Contract produced by Dr. Chambers.)

That contract was to run until December 31st, 1900, and a number of claims were staked under it in my name. I executed to Chambers a deed of conveyance for a one-half interest in these claims staked by me under this contract. The deed of conveyance was not made out until April, 1902, and Dr. Chambers has the deed.

Mr. GILMORE: Here is the agreement you refer to, and here also is the deed of conveyance you wish.

That partnership agreement continued until December 31st, 1900, and in 1902 I executed a deed of conveyance to Dr. Chambers for a one-quarter interest in the claims in the Bluestone.

Question. Why was it for a quarter interest instead of a half interest?

109 Answer. Well, in 1900 we represented these claims.

Question. You mean you did the assessment work?

Answer. Yes; done the assessment work on all those claims, under an agreement with Dr. Chambers. I had grubstaked two other fellows, and they also got in and located other claims—I had other fellows locate other claims. Under the Chambers location or agree-

ment, I had an agreement to represent six claims—I think Chambers and I owned about fifteen claims, which I had staked, but only six of them, I think, were represented, and in 1900, I didn't return to Nome until the fall of 1901. At that time I presented the bill to Dr. Chambers for his share of the assessment work, three hundred dollars; he said he didn't have the money, and I waited for quite a little while; I believe he said first that he would have it in a short time, but I waited off and on all winter until the spring of 1902, in April, when I was about ready to return—I was ready to return sometime in April, or the first of May, 1902, to Gold Run, about April or shortly thereafter—I was intending to go back to Gold Run over the ice—I went back over the ice. I then asked Chambers for his three hundred dollars. He said he didn't have it, and in lieu of the three hundred dollars to make a bill of sale for a quarter interest in the property, so he gave me a quarter for representing the work in 1901.

Question. Is that the agreement you had between yourself
110 and Dr. Chambers, which you say was entered into between yourself and Dr. Chambers in 1900?

Ans-er. Yes, sir, that is in my handwriting.

Whereupon said agreement was offered in evidence and received without objection, marked Defendants' Exhibit "A," read to the jury, and was in the words and figures following, to wit:

DEFENDANTS' EXHIBIT "A."

Agreement, June 30, 1900, Whittren and Chambers.

NOME, ALASKA, June 30, 1900.

This agreement made and entered into this 30th day of June, 1900, between J. Potter Whittren and J. J. Chambers of Nome, Alaska, Witness: The said J. J. Chambers to furnish the sum of one hundred (\$100.00) dollars to the said J. Potter Whittren for expenses to go to Port Clarence and engage in any work as he may think best to further the advantages of both parties in a financial way, and the said J. Potter Whittren to give the said J. J. Chambers one-half ($\frac{1}{2}$) of all property he may acquire during the term of this agreement. This agreement to remain in full force and effect during the year 1900 unless dissolved by mutual consent of both parties.

J. J. CHAMBERS.

J. POTTER WHITTREN.

Witness: THOS. DWYER.

(Documentary revenue stamps to the amount of thirty cents.)

WITNESS (continuing): This agreement is in my handwriting.

111 Whereupon, a deed was handed to the witness and having been by him identified, was offered in evidence, admitted without objection, read to the jury and marked Defendants' Exhibit "B," and was in the words and figures following, to wit:

DEFENDANTS' EXHIBIT "B."

Deed.

Whittren
to
Chambers.

Know All Men By These Presents, That J. Potter Whittren, of Nome City, Alaska, the party of the first part, for and in consideration of the sum of \$1000.00, and other valuable considerations, dollars, lawful money of the United States of America, to him in hand paid by J. J. Chambers of the second place, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, an undivided one-quarter ($\frac{1}{4}$) interest in the following described property:

No. 11 Above on the Bluestone River;

No. 8 Above on Skookum, a tributary to Gold Run;

No. 1 or the mouth claim of "Whittren Pup";

No. 1 or the mouth claim of "Potter Pup."

No. 8 Above on Lucky Strike, a tributary to Bluestone;

No. 2 Above on Boulder Creek, a tributary to Gold Run.

All the above are creek claims situated in the Port Clarence Recording District, District of Alaska, and recorded in 1900 by 112 J. Potter Whittren. Also a one-sixteenth ($\frac{1}{16}$) interest in the "Welcome Bench Claim," staked as an association bench of 160 acres, situated in above-mentioned district. All these claims were represented in 1901. To have and to hold the same to the said party of the second part, his executors, administrators and assigns forever. And he does for his heirs, executors, administrators covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same. In Witness Whereof, I have hereunto set my hand and seal the 21st day of April in the year of our Lord one thousand nine hundred two—1902.

J. POTTER WHITTREN. [SEAL.]

Signed, sealed and delivered in presence of

F. E. FULLER.

TERRITORY OF ALASKA,

Precinct of Nome, ss:

This is to certify that on this 21st day of April, A. D. 1902, before me, F. E. Fuller, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came J. Potter Whittren, to me known to be the individual described in and who

executed the within instrument, and acknowledged to me
113 that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.]

F. E. FULLER,
*Notary Public in and for the Territory of
Alaska, Residing at Nome.*

Whereupon the witness continued: That handwriting is also mine. I had some other business relations with Dr. Chambers after the Bluestone deal, that is, he agreed after that to give me a hundred and fifty dollars for that quarter in the fall when I came down. He had slipped out of town, however, in the meantime—he had got into some trouble with his housekeeper or mistress—housekeeper, so-called—and had left town rather hurriedly, I understand. He did not pay his part of the assessment work on that ground that fall. He never did. I had some business relations with him after that time in the spring of 1903, upon my return—I went out in the fall of 1902, and in the spring, on my return—but when I went out to Seattle in the fall of 1902, and was there during the winter. Chambers was not in Seattle when I went to Seattle, but he had a place in the Northern Hotel, but he had gone to Alliance, I think it was, or to some town in Ohio—yes, Alliance—that is the name of the town, I am pretty sure, where his folks were but he had left his address at the Northern Hotel in Seattle. This was not in the
114 spring of 1903, but the fall of 1902, when I went out in the fall of 1902, and when I returned in December—I won't be positive about these dates, but I had been away from Seattle and returned to Seattle late in the year of 1902; I won't be positive about these exact dates. When I returned Chambers had also returned and was practicing his profession in Seattle. I told him that he never had paid me the hundred and fifty dollars for representing those claims—that I had represented the claims again, and that he owed me a hundred and fifty dollars, his share, and I showed him the record of the notice of representation—of the assessment work. He said that he would have the money during the winter; that he had just started up in business and was financially embarrassed as it were at that time; that he had just moved his family to Seattle, I believe, and had had to use a good deal of money and so on. We remained friendly all winter; I saw him occasionally during the winter. I was in business that winter in Seattle myself, and when it got towards spring in 1903, just prior to my return to Nome—I intended returning to Alaska on one of the first boats in the spring of 1903, and in the spring I went to Chambers, in 1903, and again demanded this one hundred and fifty dollars, and also the money for the current year. He said that he had decided to let the property go. I said "All right, but you had better hold on," something like that; "the Bluestone is liable to make good any time; she looks pretty good to me, one claim especially." He said, well, he would take the matter under advisement and for me to call

around in two or three days. I went again in five days;
 115 I went around and saw him, and made him a proposition to
 waive last year's hundred and fifty dollars, and that he
 would put up a hundred dollars this year to represent four claims,
 a quarter interest in four claims. That was for 1903's work. He
 said, "I want five and a half Little represented," and he said: "You
 pick out three of the best claims, only one in the Bluestone, and
 represent them." I said that was satisfactory to me, but I don't
 like to waive my hundred and fifty dollars, because I wanted three
 hundred dollars before. But he said that he was right up against
 it; he had his family there and his expenses were high, and talked
 along those lines, so I decided—I don't know whether I decided it
 then or subsequently—I don't remember, but I did agree to accept
 the hundred dollars and told him to bring the bills of sale down and
 we would go over them together and pick out—I don't remember
 what the bills of sale were for in the Bluestone now—I know there
 was six—it was either six or seven, but I labored under the im-
 pression that there were six, any way. He said he would; that they
 were up at the house but that he would bring them down the next
 day. The next day I went around to Dr. Chambers' office again,
 and he brought down his bill of sale on the Bluestone; said that
 was the only one he had. This was in 1903, in May, just before
 the boats started, and the deed was again fixed up and I received the
 hundred dollars from Dr. Chambers. The deed is the one that
 Dr. Chambers has. I said to Dr. Chambers that I had given
 116 him a bill of sale for a three-quarters out here which should
 also be made a quarter on the Bon Voyage, and also a
 quarter on five and a half Little, and also a one-quarter on Extra
 Dry, the Lucky Bench on Extra Dry. He said there would be no
 trouble about the agreement; I said we ought to have it all fixed up
 now while we were at it. I told him that we ought to have it all
 embodied in the lease just the same, and that I would get the num-
 bers out of the recorder's office when I went back up to Port Clarence.
 I took the hundred dollars and gave him a receipt for it, and we
 agreed that I should represent three claims which I should pick out
 on the Bluestone, whatever ones I thought were the best, and
 Chambers said that he wanted $5\frac{1}{2}$ Little represented also. I said
 I would like to get the matter all fixed up while I was there; he said
 all right; that he would look amongst his papers up home and see
 if he could find the deed amongst them; he said he didn't think he
 had it; that he had never had it recorded, and didn't believe he had
 it. I said "All right," and took the hundred dollars and gave him
 a receipt for it. The next time I saw him he said he had looked
 among his papers but that he could not find the bill of sale; he
 said he thought he had given up the receipt, or if he had not, it
 had got mislaid and lost; that he never had had it put on record,
 and that he didn't claim anything under it but a quarter in No.
 $5\frac{1}{2}$ on Little; that he wanted that claim represented. I refer to
 the bill of sale in the Nome Precinct. It is the one that has been
 introduced in evidence here and marked Plaintiff's Exhibit
 117 No. 1. The Doctor claimed at that time that either I had not
 given it to him or that it had been lost. That is what he

claimed in the spring of 1903, but he said that it had never been recorded, but that he would look a second time, and after looking a second time decided that it had been lost, and I agreed to accept a hundred dollars, which I did and gave him a receipt for it and agreed to do the representing—the numbers of the claims was not inserted in the receipt I don't think, but I was to pick out the three best claims in the Bluestone and 5½ Little, and for that reason the descriptions of the claims in the Bluestone was left blank.

Whereupon the receipt referred to was produced by counsel for the plaintiff, was offered in evidence, received without objection, marked Defendants' Exhibit "C," was read to the jury and was in the words and figures as follows, to wit:

DEFENDANTS' EXHIBIT "C."

Receipt for \$100, May 20, '03, Whittren to Chambers.

J. Potter Whittren.

Tel. John 3241.

J. S. Wheeler.

Whittren & Wheeler.

Real Estate and Mines, 335 Lumber Exchange.

Provident Home Co-operative Co., of Penn.

SEATTLE, WASH., May 29th, 1903.

Received from J. J. Chambers, the sum of one hundred (\$100.00) dollars to be used in representing his undivided one-quarter
118 (¼) interest which he owns with the undersigned in the following described property, situate in the Port Clarence Recording District, District of Alaska, and more particularly described as follows, to wit:

Creek claim known as No. 11 above on the Bluestone River about one-mile below the mouth of Gold Run and Right Fork of Bluestone.

Creek claim known as the mouth claim on "Whittren Pup," which joins Gold Run creek at No. 3 above Hayden's Discovery on Left Limit.

Creek claim known as the mouth claim on "Potter Pup," a tributary to Gold Run at Hayden's Discovery on Right Limit, and

Creek claim known as No. 2 above on Boulder Creek. Said \$100.00, to be used in representing said claims during the year of 1903.

It is agreed that in case of a division of said claims owing to the present outstanding contracts for labor and prospecting, the said J. J. Chambers is to retain his undivided one-quarter (¼) interest in said claims.

J. POTTER WHITTREN."

Whereupon the witness continued: The understanding between myself and Dr. Chambers in the spring of 1903, with reference to the Bon Voyage claim, the claim in question, was, that he told me to let the two wildcats go; we considered those wildcats at that time. In May, 1903, he said to represent 5½ Little, the one that Russel gave us, and to let the two others in the Nome Precinct go; to let the two wildcats go; that was the way he expressed it. The
119 Bon Voyage was located January 1st, 1902, so that no representing work had been required up to the time that I had this conversation with Dr. Chambers. Dr. Chambers has never paid one cent or any other sum toward performing the assessment work, in keeping alive the Bon Voyage claim. He has never offered to pay any such sum. The last offer that Dr. Chambers ever made for work done upon any of the claims was the one hundred dollars which he gave me, for which I gave him this receipt. The one hundred dollars in May, 1903, was for representing No. 5½ on Little Creek and three claims in the Bluestone. After that Dr. Chambers may have written some letters, because I sent out letters subsequent to 1903, also containing the receipt which I had received for the 75 per cent for doing the assessment work in the Bluestone, showing that the money had been paid for the work, and also my returned check from Solner's Bank at Nome; that is, the Bank of Cape Nome. Yes, sir, I sent that to Dr. Chambers signed Charles Voigt.

Mr. COCHRAN: Have you that check, Dr. Chambers?

Dr. CHAMBERS: No, I never received it.

Witness continuing: And I stated at the time that I had the receipt from Charles Voigt, for the claims he was to represent which he had signed, and if he wanted that to let me know, and that I would send it to him, and that I had represented 5½ Little myself.

And, also, that if he wanted the work done for 1904, if he
120 would send a hundred dollars that I would do the same as

I had done and that we would keep the same three claims to the Bluestone and 5½ Little. This was done either in the fall of 1903 or the spring of 1904. In the fall of 1904, I received no money in answer from Chambers, but that fall I did receive a letter from Dr. Chambers pertaining to some claims which he wished me to have staked but no reference to the hundred dollars, but the letter which I received from Chambers was one in which he asked me to have some claims staked, but no hundred dollars. I have been procuring the assessment work on the Bon Voyage claim to be done since its location, the entire assessment work. In the spring of 1903, certain written communications passed between myself and Dr. Chambers, also in the fall of 1903, or the spring of 1904, and after the claims had been represented some replies to my letters. I have not got these replies. All of my outfit was burned up in the fire that we had here in the summer of 1905, all my papers. I was not here at that time. I have not copies of the letters that I sent.

Mr. COCHRAN: I will ask the plaintiff if he has any letters written to him by J. Potter Whittren in the summer and fall of 1904, or spring of 1904?

Mr. GILMORE: We have some which we will introduce at the right time, when they become material. We do not think it is necessary to produce them at this time.

Mr. COCHRAN: We will ask you to produce them at this time.

121 Mr. GILMORE: What letters do you want?

Mr. COCHRAN: We want any letters which you may have in your possession written by J. Potter Whittren to Dr. Chambers pertaining to assessment work, pertaining to these claims or any of them, or particularly to the claim in question.

The COURT: We overrule counsel's objections, and order the letters produced. I do not know that they have any bearing upon the testimony. I cannot tell unless I read the letters themselves.

Whereupon Plaintiff's Exhibit Number One, the deed in question, was handed to the witness, with instructions to examine the same, and particularly the words "one-half" in letters, and the figures $\frac{1}{2}$ in the conveying clause.

Whereupon the witness continued: That is not the same instrument which I executed. With the exception of these parts it is the same instrument. Originally, according to my best recollection, it was a one-quarter interest. It could never have been three-quarters. I do not see how I could have made it for three-quarters, because it was for a quarter, the Doctor and I have never been partners for more than a quarter in any of that ground out there. It could not be any different. I said to Dr. Chambers at the time, or just before I left Nome in 1903, that if I ever struck it up in the Bluestone, after I had stayed up there two or three years, that I hated to give it up, and that I believed that we would strike it up there yet, and that if I ever did I had to give a half interest in anything

122 that I got—that I had got nothing for representing this property and that I had had to give away a half interest in it to get the representing work done, and that was enough as it was. My best belief is that the quantum of interest mentioned in this instrument has been raised from a quarter to a half. All I have got is Dr. Chambers' word for it that he did it. I did not see him do it. All I have is his word. He told me he did it. The part that has been changed is not in my handwriting, not the part that has been changed by chemicals. The body of the deed, all but that part I believe is in my handwriting. There is a marked difference to my mind between my handwriting in the body of the instrument and this portion which has been erased by chemicals and written over. I used to carry out the 2—that way more (illustrating) more of a down stroke—that has more of an upward stroke, at the curve at the end of the figure 2. After the execution of this deed Exhibit No. 1, I next saw it May 24th, 1906, in Doctor Chambers' office, in the Alaska Building in Seattle, Washington. It was in Dr. Chambers' possession.

Whereupon, the letters hereinbefore referred to were handed by counsel for the plaintiff to counsel for defendants.

And thereupon the witness continued: He got the deed from one

of the pigeon-holes of his cabinet. That was the first time I had seen it since its execution in 1902. No one else was present at the time. It was about nine o'clock in the morning. I went up to,

I think it is the 11th floor of the Alaska Building, to see
 123 W. V. Rinehart, Jr., whom I had seen the evening before and he told me he had a telegram for me from Gene Chilberg from Nome. The telegram related to this claim in which I had an interest. I went to see Rinehart and get this telegram, but he was not in. It was not quite nine o'clock, or it may have been right after nine. I know I did not find Rinehart in his office, and he did not come in until about half-past nine. I went down to Chambers' office to wait for Rinehart. Dr. Chambers was there when I arrived. I had seen him the evening before. I had not been in Seattle all the time. I arrived on the 22d in the evening and I had seen Dr. Chambers on the 23d, and this was on the morning of the 24th the following day after my arrival in Seattle I saw the Doctor in his office. I called on him during the day or evening of the 23d, and had a discussion with him about my mining property here in Nome. It came up on account of this telegram which Rinehart had received. I told Dr. Chambers that he ought to -ave kept up his representing work because there had been a telegram concerning some claim which I owned there from Chilberg. He said he was sorry but he didn't have the money to keep it up. The next morning when I was up there about nine o'clock, Dr. Chambers greeted me when I went into the office, and said "Whit-tren, I see that I am a partner of yours in this Bon Voyage claim and two others in the Cape Nome Precinct," or words to that effect.

I used the words: "The hell you are!" Let me see your bill
 124 of sale." Then Doc went to this pigeon-hole in his small cabinet, and produced this bill of sale which is exhibited here. This is the one Plaintiff's Exhibit Number One. I *sa* says to him, "What have you been doing to it, Doc"? He says: "Nothing." I says: "Well, what is this great yellow blotch here? Where the interest has been changed?" He says: "Why it is just as it has always been; I found it after you went away last evening in amongst a lot of letters." I don't know whether he said in his house or in his office. "Well," I said, "Doc, I never conveyed a half interest in that property to you, and you know it." He said—he tried to make me think it had never been changed. He said it was just as it was when he got it, and that it never had been changed. "Well," I said, "This is what you have done; you have changed this to a half, making it a half." He talked along for quite a while, and then admitted that he had changed it to a half. I told him then that I had a notion to take *ti* and go *down* to Mr. Miller, the Prosecuting Attorney, who was a friend of mine, and put the matter before him, tell him everything, and leave it with him, but he argued me out of that, and we argued it out between us there in the meantime. We had it hot and heavy there for a while until he finally admitted the change, and then he said that he was sorry, but on account of the relationship that had *exhisted* between my wife and his wife, and of account of his boys, who was then growing

up and his daughters, young women, and along those lines;
125 said he had "been up against it" there *is* Seattle, and that
his young daughters were growing up there in Seattle, and
that it would ruin them and him, disgrace them for life, and so on,
and that there was nothing in this world he would not do if I would
not expose him. I told him that I had a notion to break his head.
Well, Doc, can be very humble at certain times, and he certainly
was humbling himself there. The upshot of this was that I told
him that I never would recognize that bill of sale nor that instru-
ment, nor would I ever give him a cent that came out of that prop-
erty, but that I would give one-half of the twenty-five per cent from
the property to his wife; that I would give his wife twenty-five per
cent but that I would never give him a cent as long as I lived.
He wanted me to give him a writing to that effect; I said: "No. I
will never give you any other kind of an instrument, of any kind."
"Well," he said, "I will give you a writing." I told him he could
do what he pleased, but that any man who would use acids on an
instrument could never have my signature on any writing of any
kind. He wanted me to give him a written memorandum of what
I would give his wife. I told him I would give his wife half of the
twenty-five per cent but that I would not set my signaturer to any
writing for him again; he said then he would give me one. I said,
"All right, you can do as you please about that." He says, "I will
give you a memorandum then," and he sat down to his desk
126 and wrote out this memorandum which we have here, a copy
of it. I meant that was the original and Dr. Chambers has
a copy. This is the same instrument which was exhibited to the
court at the time of the injunction and marked as an exhibit at
the time of the hearing on the injunction. The instrument now
handed to me is the instrument I refer to.

Whereupon said instrument was offered and received in evidence,
marked Defendants' Exhibit "D," and read to the jury,—was in the
words and figures following, to wit:

DEFENDANTS' EXHIBIT "D."

Memorandum, May 24, 1906, Signed by J. J. Chambers.

Dr. J. J. Chambers,
601-03 Alaska Building.

SEATTLE, WASH., May 24, 1906.

Memorandum.

This is to certify that J. Potter Whittren and myself are equally
interested in the one-half interest (that is one quarter each) in the
Placer Mining Claim "Bon Voyage" in the *the* Nome Mining Dis-
trict, Alaska, staked Jan. 1st, 1902, by J. Potter Whittren. Said
Whittren is entitled to a deed for a one-quarter interest in said claim
on demand.

J. J. CHAMBERS.

Whereupon the witness continued: That is Dr. Chambers' handwriting and his signature, and is the instrument which Dr. Chambers gave to me personally on the 24th of May, 1906, when it was mutually agreed that I should take it and talk the matter over with his wife and tell her that I would send the proceeds to her. He asked me if I would go out and take dinner with them that night—that it would appear all right if I would go out and take dinner as I always used to go to his home to dinner when in Seattle; I told him no; I didn't propose to go to his house or have anything to do with him after what he had done in the way of changing the bill of sale. I did not go down to dinner with him. I told him I would not go to dinner with him, but that I would go and see his wife, but that I would call some evening when he was not present; he then agreed that he would not be there on the evening when I called, and I was to keep him informed as to what transpired on the claim and as to the receipts if we sold, if I sold it, and she was to receipt for any moneys which I sent to her, and keep him posted as to what was done by the laymen under the—if I gave any leases, and how I disposed of it. I told him that I would go and see Rinehart and tell him that I would like to see the telegram myself, so he had telephoned up to see if Mr. Rinehart had come in; Mr. Rinehart then came down to Dr. Chambers' office. I saw Dr. Chambers again during the day of the 24th of May, 1906. I saw him again in Nome sometime in September. I met him here at the foot of Steadman Avenue, when I was coming out of my office. I heard Dr. Chambers' testimony saying that I changed the deed offered in evidence and marked Plaintiff's Exhibit Number One. I never had anything to do with the changing of that deed in any way. Dr. Chambers did not tell me the reason he had changed the deed. He didn't say. We had it hot an- heavy there at the time he admitted that he had made the change. I don't know that he said; he admitted that he had changed it and that was satisfactory to me. I had a conversation after that time with Dr. Chambers in Nome about the alteration of that deed. The date of it I do not know exactly. It was sometime in September. I was returning—I had been out making a survey, Mr. Eadie and myself, and I met Chambers down here at the foot of Steadman Avenue; he came up and wanted to shake hands; of course I would not shake hands with him or a man of that kind, after what he had done; then he tried to shake hands with Mr. Eadie, and Eadie said, "No." I don't know that he said anything—something like "when I get rhrough with this case" something—I forgot just how it was—no—I said to him: "When you get through with this case you will be pretty careful how you use chemicals on any instrument," or something of that kind—the deed is not nearly so yellow there as it was when I saw it first; the yellow has faded out of it now a good bit. He told me he had used chemicals when he made this alteration in the deed. I saw this deed at the time of the hearing of the injunction last fall. The deed has been changed since then. This yellow stain is almost

obliterated, where it has been written under the one-half and also under the figures " $\frac{1}{2}$;" this yellow stain came away out around here more and you could read underneath—you could see there was writing under these words and figures and now you can't see what the marks are; you have got to have a strong glass, as strong a glass as you can get, and then you can make out writings underneath these letters and figures, in fact, I tried to make it out—you can just see along the edges where this stain used to be, along the edges you can see the word quarter under there "quarter" or something, you can see under there with a very strong glass. I have not had this instrument in my possession at all since the hearing on the injunction in this case. This instrument was not changed while I was in Dr. Chambers' office in Seattle on the 24th of May. When I first saw the deed there on the 24th of May in the morning in Dr. Chambers' office it appeared to have been freshly changed. That was what called my attention to it. The ink was entirely different from this; there seemed to be this draughting ink, and this seems to be just common ink; it showed up pretty plainly at that time; one ink was blue and one was black at that time. It all seems to be black now.

Whereupon a paper was handed to the witness who identified his signature thereto, which said paper was then offered in evidence, received without objection, read to the jury, and was marked Defendants' Exhibit "E," and was in the words and figures following, to wit:

130

DEFENDANTS' EXHIBIT "E."

Deed.

Whittren
to
Eadie.

Know all men by these presents: That J. Potter Whittren, of Nome, Alaska, the party of the first part, for and in consideration of the sum of one dollar, and other valuable considerations, lawful money of the United States, to him in hand paid by Andrew Eadie, the party of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, an undivided one-half ($\frac{1}{2}$) interest in the following described placer mining ground, situate in the Cape Nome Recording District, District of Alaska, and more particularly described as follows, to wit:

One certain Bench Claim known as the "Bon Voyage," situated about 1500 feet in a southerly direction from No. 3 Creek Claim on Newton Gulch, staked and recorded in 1902, surveyed and survey stakes with name and corners carved on same, placed in tundra mounds in the fall of 1903.

Said bench containing twenty acres of placer mining ground.

To have and to hold the same to the said party of the second part, his executors, administrators and assigns forever. And I do, for his heirs, executors, administrators, covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In witness whereof, I have hereunto set my hand and seal the 24th day of Sept., A. D. 1905.

J. POTTER WHITTREN.

Witness:

L. A. FEIKE.

J. W. ALBRIGHT.

UNITED STATES OF AMERICA,

District of Alaska, ss:

This is to certify that on this 24th day of Sept., A. D. 1905, before me, J. W. Albright, a Notary Public in and for the District of Alaska, personally came J. Potter Whittren, to me known to be the individual described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.]

J. W. ALBRIGHT,

Notary Public.

And was endorsed, as follows, to wit:

"32311. Deed. Filed for record at request of Andrew Eadie, Oct. 9, 1905, at 05 minutes past 10 o'clock, and recorded in book 154 at page 302, Records Cape Nome Recording District, Alaska. 132 T. M. Reed, Recorder. By W. W. Sale, Deputy. 4 folios 3 Ind. 2.85 paid."

Whereupon, the witness continued: I had a contract with Andrew Eadie with reference to conveying to him an undivided one-half interest in this claim prior to the execution of this deed. Mr. Eadie has it. I don't know whether Mr. Fuller has a copy of it among my papers or not. I think Mr. Fuller has my copy of it amongst my papers.

Mr. ORTON: Mr. Eadie says his copy was burnt up in the fire in San Francisco.

The WITNESS (continuing): This contract was entered into in October, 1904. Under this contract or agreement, I subsequently then conveyed to him an undivided one-half interest in the Bon Voyage claim.

Whereupon a paper writing was exhibited to the witness with the instruction that he examine the same, and the witness having identi-

fied his signature and also that of Mr. Eadie, testified that said instrument was the contract made between him and Eadie in October, 1904, whereupon said contract was offered in evidence, but, upon its being objected to by the plaintiff, the Court sustained the objection, and said contract was not admitted in evidence, but was marked defendants' exhibit for identification, "No. F," and is in words and figures as follows:

133

DEFENDANTS' EXHIBIT "F."

Agreement, October 1, 1904, Whittren and Eadie.

This agreement, in duplicate, made the 1st day of Oct., 1904, by and between J. Potter Whittren, of Nome City, District of Alaska, of the first part, and Andrew Eadie, of the same place, of the second part, witnesseth: That the said party of the second part covenants and agrees to and with the party of the first part, for and in consideration of the sum of ten (\$10) dollars, the receipt of which is hereby acknowledged, to prospect one certain placer mining claim situate in the Cape Nome Recording District, District of Alaska, and more particularly described as follows, to wit:

Bench claim known as "The Bon Voyage," containing twenty acres of ground, and on the left limit of Newton Gulch, opposite Creek Claim No. 3, from the mouth, and being about 1500 feet from said No. 3 creek claim in a southerly direction.

Said Bon Voyage claim having been surveyed and corner posts with tacks in them, to designate the said corners, by the said party of the first part.

The said party of the second part further agrees to do at least one hundred (\$100) dollars worth of work on the said claim, before the 31st day of Dec., 1904, in order to comply with the laws as representing said claim.

And the said party of the second part covenants and agrees to pay unto the said party of the second part, for the same, an undivided one-half ($\frac{1}{2}$) interest in the said property to be delivered when said work has been completed.

In witness whereof, the parties of these presents have hereunto set their hands and seals the day and year first above written.

J. POTTER WHITTREN, [SEAL.]
ANDREW EADIE. [SEAL.]

Witness: G. H. WINTERMANTLE.

To which ruling of the Court the defendants then and there excepted, which exception was by the Court allowed.

Whereupon the witness continued: Since the location of the Bon Voyage claim the plaintiff Chambers has done nothing with reference thereto. The deed admitted in evidence and marked Plaintiff's Exhibit Number One purports to convey an undivided one-half interest in Number 5 $\frac{1}{2}$ Little Creek; 5 $\frac{1}{2}$ is a fraction off of Number 5 Below Discovery, on Little Creek. I decided that to Frank Was-

key's sister-in-law, Miss Nell Blodgett. I told Dr. Chambers about that upon my arrival in Seattle in the fall of 1904. I called on Dr. Chambers. I wanted to know how we stood. I told him he had not sent up the hundred dollars that I had asked him for, which was required to represent his four quarter interests, being the three-quarters he had in the Bluestone, and the one-quarter interest he had on Little; that I didn't believe that $5\frac{1}{2}$ on Little was worth representing, and I had given a deed to the half I owned.

135 I do not know whether we still held under the old deed or not; I told him that I had represented it the year before, and I told him at that time that I still claimed and held one claim out here, the Bon Voyage, and I asked him if he did, and told him I wanted to be sure about that, because I had signed a deed in blank for it because I was still of the impression that there was a deed to him for a quarter interest in it, and that I wanted to make sure because I had signed a deed to a man for doing the representing work for that year, or a contract for a deed rather, and I wanted him to look it up and see; he said he would look it up. He said he had looked for it, but never found it. I told him then, I said: "I'll tell you what I'll do; if you will put up fifty dollars you can have half of what I have got, twenty-five dollars for 1903, and twenty-five dollars for 1904, and you can hold onto the ground yet." I told him I thought he had an undivided quarter interest in the deed; he said he didn't believe—he said he had spent money enough on that country; that he didn't believe in sending good money after bad, and that he intended to let it go; that he was out of that country entirely, and was gald of it. I told him he still had these interests in the Bluestone, and I also told him I didn't like to lose all of my claims; that there was one of them I still thought I would hold; that I still held that. I do not know whether or not he made a search to find whether he had a deed from me to an interest in $5\frac{1}{2}$ Little and the Bon Voyage at that time. He said he would look, but he was positive he did not, 136 because he had looked the day before. I cannot recall now whether I saw him after that time with reference to whether or not he had a bill of sale. I cannot recollect. I wanted him to hold onto $5\frac{1}{2}$ Little on account of Joe Brown having struck something out there. I had a conversation with Dr. Chambers in Nome with reference to the alteration in this instrument in Mr. Fuller's office. I think I came into Mr. Fuller's office and Dr. Chambers came in after me, and at that time Dr. Chambers admitted he had made the chemical change, but that I had written the words one-half and the figures " $\frac{1}{2}$," that he had furnished the chemicals and I had done the writing, or something to that effect. He said that in the presence of Mr. Fuller. Mr. Andrew Eadie was present, I think, though I won't be positive as to that. I do not think any one else was present.

Cross-examination.

Witness continuing: I should say that I had a passing acquaintance with Dr. Chambers in Dawson, but I should say our best

acquaintance started on the boat in 1900 coming up; I did not have any particular acquaintance with him in Dawson. He and I began our particular friendship in 1900, on the steamer to Nome. Later in the year, when the reported strike came out, after the reported strike on the Bluestone, I went to see the doctor and told him about hearing of this reported strike. On the boat coming up it was mutually agreed that if we heard of any strike that we

137 should keep each other posted, and I heard through some one—I believe Jim Rudd brought down this report of the strike; anyway, I believe Jim Rudd told me about it, and I went to Chambers and told him that I was going up. The result was that the Doctor and I entered into a kind of a memorandum of agreement, and I got him to put up a hundred dollars towards outfitting me for the trip. He was to let me have this one hundred dollars and I was to count him in one one-half of any thing which I myself staked in the Bluestone District—not anything that I might acquire in the District. I then went into the Bluestone District, and I think I located personally some ten or twelve claims; some of them we didn't represent afterwards. Under our written memorandum of agreement I was to have one-half of anything in the Bluestone of all the property, and Dr. Chambers was to have the other half. All these claims were located in my name, and I undoubtedly held the legal title to all of those claims located in the Bluestone. I held the legal title to all the claims located in the name of Whittren, and his interest was to be conveyed to him afterward; although I think there were one or two afterward. The legal title to all of the claims the Doctor and I were jointly interested in in the Nome District was in my name; that is, all the claims were jointly interested in, not all the claims that I owned. We were not jointly in 5½ Little. We were not jointly interested in the Bon Voyage

138 Bon Voyage at the time of its location. We were not jointly interested in the one out here on Extra Dry, the Rocky Gulch, until the deed passed. We did not have jointly between us a fraction on Anvil Creek, one that was afterwards located for me. I should say that we had determined to locate it, but we did not afterwards agree to it. I know the claim you mean, the one on Anvil. Dr. Chambers was certainly entitled to one-fourth. Dr. Chambers wanted to claim some interest in this claim when it was located, but that was in 1900, and this was in 1904, if I remember right. Chambers was interested in the location of a claim with me, before these claims were staked—that is these three—I will confine myself to three first. I will have to explain myself. For paying the recording fee of two dollars and a half Chambers claimed that he had a one-quarter interest in the Bon Voyage and a one-quarter interest in the Rocky Bench, that is, one Extra Dry, and a one-quarter interest in five and a half on Little Creek. I say that Dr. Chambers was to have an interest in the Bon Voyage, 5½ Little and the Rocky Bench on Extra Dry, which interest was to be a one-quarter interest for advancing the recording fees after they had been staked. He had no interest at the time of the location. I gave

in a quarter interest for advancing the recording fees. And I gave
in this quarter interest by deed of conveyance for advancing two
dollars and a half. This was three or four days after I
39 returned from my location of these claims. That is the way
he obtained his interest in the Bon Voyage. I think it was
ix—I would not say positively, but I think it was six, out of the
claims I staked in the Bluestone that I represented in 1901. For
the work which I did in the Bluestone, Dr. Chambers owed me three
hundred dollars, or half the amount for the work of representation.
I made a demand on Dr. Chambers for the three hundred dollars.
He stalled me off until the month of April, 1902. At that time it
was settled up in this way, that I should give him back—he agreed
to take a quarter interest instead of a half. In the month of April,
1902, I agreed with him that for the three hundred dollars in money
which he owed me—I went to him and told him that I wanted the
money, and he said that he would concede me one-half of the inter-
est in the Bluestone that was coming to him by reason of my doing
the work, and that is the way the Bluestone deed was made out
to me, in lieu of representing work in 1901. And at that same identi-
tical time there was a deed executed, and at the same identical time
the other deed was executed. I do not remember whether these two
deeds were executed on the same day and before the same notary or
not. The deeds will show for themselves. When I conveyed the
quarter interest in the Bluestone property to Dr. Chambers, I also
executed a deed for the same amount of interest in the Cape Nome
Mining District. The deed Exhibit "B" is the deed conveying the
one-quarter interest in the Bluestone property, and was exe-
140 cuted on the day it bears date. The body of this instrument
is in my handwriting, and was prepared by me and executed
before Mr. Fuller.

Mr. GILMORE: I will ask the jury to examine this deed.

The WITNESS (continuing): Now, at the same identical time I
prepared the other deed to the quarter interest, the interest in the
Nome Mining District, and that was taken before Mr. Fuller and
executed at the same time. Dr. Chambers testified yesterday, being
under oath at the time, that at the time the deed was written it was
for a three-quarters interest, and I have testified that when the deed
was made it was written one-quarter. I am as sure now of that as
of everything else I have testified to. I don't think I could be mis-
taken about that. If Dr. Chambers raised it to one-half when he
made the alteration, he must have raised it from a quarter to a half,
instead of lowering it from three-quarters to a half as he says was
done. I admit that this deed is in my handwriting and was pre-
pared by me other than the changes that are made there in the
words and figures. If that was originally written by me "one-
quarter" in words and in figures and it was changed by some other
person than me and raised to one-half, why the word "one" would
be erased in the words and in the numerals—I have no reason to
give the jury for that. I don't swear that the word "one" was

141 erased; all that I swear was that it was changed to a half;
this deed here to the Bon Voyage; that the word "one" was
erased. I say that was because there were marks here that
show there had been something written there before that. I do
swear that chemicals were used in erasing it. I don't know, there
might be a question but that the word "one" was erased by chemi-
cals, if it was originally in the instrument and the whole thing was
raised to one-half. I don't swear positively that I didn't write the
word "one" in the word "one-half" as it now appears. I am still
somewhat in doubt about that. If I didn't write it in as it was in
the original instrument as I say one-quarter; then I think the words
"one-quarter" must have been erased, and I think it shows that by
the use of chemicals it was erased. It shows more there before even
than it does now. I say that it appeared plainer last fall when I
saw it in court here than it does now. I think, if you will look at
it closely, that you will see that there is some marks or something
shows a slight trace underneath the word "one." There was some
marks underneath that, if I remember correctly, that you could
see right underneath the word "one," when I saw the deed right
here in the courtroom last fall. The word "one," I don't know if it
was changed, but I know that it was originally written "one-quarter."
My contention is that the words showing the quantum of interest
as originally written showed one-quarter; that those words have been
erased and the words one-half and the figures one-half written in
instead, since the time it was executed. From an examina-
142 tion of those words one-half there, I am willing to swear that
I didn't write those words. It is not a fact, that when I came
to Dr. Chambers in the month of April, 1902; that at that time Dr.
Chambers and I had a settlement of the question of assessment work,
and a question of the ownership of the claims, and that he traded
me a quarter in the Bluestone for a quarter in the Nome claims—
that I gave him a quarter in lieu of six or seven quarters up there—
I should say not. And it is not a fact that these two deeds were
drawn up which showed that I was entitled to one-half in the Blue-
stone and one-half in the Nome District—originally I. And it is
not true that Dr. Chambers traded me a quarter, or a half of his
interest, which was to be three-quarters, my interest being
one-quarter in the Bluestone, and I owning one-quarter there
and he three-quarters here. It is not true that at that time
Dr. Chambers traded me a quarter, that being one-half of
his interest in the Bluestone, I owing one-quarter and he
owning three-quarters here, we changing our relative interests;
and it is not a fact, as evidence of that, that this deed was
drawn up whereby the legal title in the Bluestone, then being in me.
I conveyed a one-quarter interest in the Bluestone, the legal title at
that time being in me, that I conveyed him a three-quarters in the
Nome District and it is not a fact that I executed a deed to him
just exchanging his three-quarters in the Bluestone for my three-
quarters in the Nome District. Two deeds were executed. I admit
the two deeds were executed to the ground, but they were both the
same, both being for a quarter interest. Each one read "one-

143 quarter." It is not true that Dr. Chambers was to have three-quarters of the Nome claim and I three quarters of the Bluestone, and I am just as sure of that as of everything else I have testified to. I had several conversations with Dr. Chambers wherein he told me that he didn't know where the conveyance was that he had from me. I recollected at that time that I had executed two deeds to him, one for a quarter in the Bluestone claims and one for a quarter in the Nome claims; that I had executed two deeds to him each reading for a quarter. There was only the one deed out in the Bluestone at that time, if you will notice this one was copied from that, after the hundred dollars was paid. He wanted to have it all in one deed so as to save the recording fee, but I told him that that would not be possible because they were in two different districts, but because it was all for this hundred dollars. If you will notice this one was copied from that and the receipt calls for the Bluestone, and the bill of sale for 5½ Little, which I was to represent for twenty-five dollars for that year, could not be found. I told him I was positive there were two bills of sale made out at that time because I remembered he wanted them embodied in the one instrument to save the price of recording fees. I told him that could not be as they were in different precincts. I came to Seattle from Nome in the fall of 1902, but not until that time, in May, 1903, did we get the matter fixed up. I met him in May, 1903. This was the first time I had been out; this was the spring of 1903, but

144 I went out in the fall of 1902, and I returned to Seattle—I had been in Seattle a great deal during the winter, but I returned in May. At that time Dr. Chambers did not tell me that he didn't want to hold onto wildcats, referring to the Bon Voyage, and this claim out here on Extra dry; he said that he didn't have the money. I think I can tell you about what he said. He said he didn't have the money; that he had been to a great deal of expense and that he didn't have the hundred dollars. He told me, when I went to him for the hundred dollars, that he owed me for the assessment work for the year 1901, at that time he was to put up a hundred dollars for the first year for the work on four claims, but he said he didn't have the money, for he had been to great expense and he said the only he wanted to hold onto anyway was 5½ Little, the one that Russel located for me, and there were also three in the Bluestone that I don't think are mentioned at all. I don't know whether the result of our understanding was reduced to writing at that time or not. I gave him a receipt but I don't think it mentioned our three claims in the Bluestone. You see, I was there later, a month or two after that time, and I told him that he had better hold on to the three until the country had been developed more. I advised him to hold on to the three claims. When I was paid the hundred dollars, or very shortly afterward, I gave him a receipt. For that hundred dollars. I was to pick out any three claims in the Bluestone and I was also to do the assessment work on 5½ Little Creek. I was to represent it. I guess that the agreement

which has been introduced in evidence marked Exhibit "C,"
145 does not mention $5\frac{1}{2}$ Little Creek, but that was agreed between us anyway. The receipt I gave to Dr. Chambers in May, 1903, while we were both very friendly and on good terms, apparently never mentioned $5\frac{1}{2}$ Little Creek. We agreed that he was to pay me and I was to do the representing work, but I was not to appear as a co-partner or as co-owner, but it was agreed between us. In that receipt it does not say anything about picking out three claims in the Bluestone. It is not a fact that he paid me that hundred dollars on account of the balance of what he owed me for assessment work in both mining districts. I swear positively that it was not paid for that purpose. I will swear positively that I got that hundred dollars on account of $5\frac{1}{2}$ Little, whether it calls for that or not, and I was to pick out three of those claims, whichever I should think would be the best up there I was to pick out what I might think would be the best claims. This receipt does not correctly state what the hundred dollars was for; it does not contain $5\frac{1}{2}$ Little. In May, at the time this receipt was given, in 1903, or within a few days after that time, either prior or subsequent, Dr. Chambers told me to let go of what he called the "wildcat" claims, and thereafter, so far as he was concerned, he was to pay none of the assessment work. My theory that he had no interest whatever in those claims started before the time of that conversation; it starts prior to that—it is my form belief that when he failed to pay the hundred dollars when

I went to him immediately after I came out, after I had
146 made the deed to this property and he offered to put up only fifty dollars, then is when, in my contention. He refused to repay me for the assessment work for representing these claims in 1903, and my position is that as far as he was concerned this is the initial or beginning point when he gave up his rights in the claim, but I didn't count him out at that time even. I counted him out after I made a demand, after I had made a demand for his share, earlier than 1906. I counted him out after the fall of 1904, and never afterward recognized that he had any interest in that claim. I do not know whether or not in the winter of 1903-4 I wrote a letter to Dr. Chambers with reference to the Bon Voyage claim.

Whereupon a paper was produced and handed to the witness.

The WITNESS (continuing): That is my signature. I wrote that letter and that is my signature. Speaking of the fraction between four and five on Anvil, I never staked a fraction on Anvil—Dr. Chambers wrote a letter in the fall of 1903, where he asked me to procure, or if I would prospect—if I would represent it. This letter was written in 1903, in the fall. This was after the location of the Bon Voyage. In 1903, the Doctor wrote a letter about a claim here, this letter has been burnt up and I will have to depend on the Doctor for where that other claim is located. It is a bench off Dexter. He sent in word about two certain claims, one of them being this claim on

147 Anvil, and the other one was a bench off Dexter, it was adjoining — Hill's, I don't know just exactly what number it was; I didn't remember now and I told him about this and he went out to stake it. I think I showed him the letter. I don't think there was anything in the letter about Five and a Half Little, but he wrote about a fraction and also about this bench off of Dexter. I never could find the one that Chambers referred to, and so there was never anything done about that one on Dexter. The fraction on Anvil—I had — relocate the two claims for Dr. Chambers. I never knew that Doc owned this fraction on Anvil, and this bench of Dexter, except this one up near the head. The claim never could be found, the one he wrote me about on Dexter; I never could find the claim and I never could find anybody that knew anything about the fraction off Anvil. The work was not done on Dexter nor on Anvil Creek. Never anything came out of it, nothing more than he wrote a letter and that was the end of it; that was the beginning of it and the end of it too; that was the beginning and the end so far as ever I knew. I did the assessment work, or had the assessment work done on the Bon Voyage in 1903, for which I paid the sum of one hundred dollars, or its equivalent. I wrote to Dr. Chambers that the work had been done upon the claim and that we were good for another year. I presume from the letter which I just looked at, I told him that the work had been done, and that we could hold the claim up until the 1st of January, 1905. I don't know
148 whether in the summer of 1904, in the month of June, I wrote a second letter about this claim. I went out to Seattle in the fall of 1904. Andrew Eadie did the assessment work on the Bon Voyage claim in 1904 for me. Andrew Eadie and myself did it in 1905. In 1906, the laymen, the lessees, the men working on the property under a lease, did the work. Mr. Eadie, one of the defendants in this case, and myself did the work in 1905. Mr. Eadie made a proof of labor that he did the work for 1904 and 1905, himself under my directions. I paid Mr. Eadie a half-interest in the claim. He and I did the work for 1905, together. In 1905, he was the owner of one-half and I was the owner of one-half. I didn't need to contract to pay him any money for the work in 1905; he was an owner with me. I did not pay him any money. He and I did the work; he had an interest in the claim and he and I did the work. I don't contend that I paid him any money. I didn't need to pay him any money, but we were out there together. I don't know how much labor I performed. In 1905, we made several trips out to the Bon Voyage. We fixed up the corners—I fixed up the corners, and picked out the place where the work was to be done for the year. I depended on Andy for most of the work and labor. I did not pay him any money. Our laymen did the work in 1906. For the work in 1906, I gave up my royalty, I think—that is, the cash or its equivalent. I gave up
149 sixty-five per cent and fifty-five per cent on the other. I never practically put my hand in my pocket and paid out any money, if that is what you mean, but I give up my royalties, which is the same thing. I and my associate, Mr. Eadie,

gave leases upon the property in consideration of the payment for the doing of the assessment work, and I think I have lost enough to do the representing on several claims. If that is not cash or its equivalent, I don't know what you would call it. It is not correct that I never paid any money for any work done upon the Bon Voyage claim after the year 1903, when I paid cash or the equivalent for that year. I paid an undivided one-half interest, which I consider the same as money. It is money, represents money; I would like to know what else it was. It represents money to me. I wish I had it now. In 1903 I paid one hundred dollars; in 1904, I paid a half interest in the claim, and in 1905, I took my instruments and went out there and fixed up the corners and spent a day or two, in fact, spent several days with Mr. Eadie, and in 1906, I gave up seventy-five per cent royalties, three-fourths, sixty-five per cent, that is my portion of it, if they represent the claim and do the assessment work; that was part of the agreement of lease. I do not consider that aside from the deed given to Mr. Eadie and the lease executed in 1906, and the hundred dollars paid in cash, that was the only money transaction. I consider those royalties were such. Except those and this hundred dollars and except my actual work and showing Mr. Eadie, picking out the place for him to do the
150 work, and my work fixing up the corners, no cash money passed between me and anyone else for doing the assessment work. I don't think I have lost this time. Referring to this Plaintiff's Exhibit Number One, I testified that the first time I saw this discoloration on the deed was on the 23d or 24th of May; I won't be positive which of those two days it was. I didn't see it on the deed at any time before that. I am quite sure of that. On the 24th of May, 1906. At that time the deed was taken from the cabinet—I call it a cabinet, a pigeon-hole in a cabinet, a writing desk it was, what I would call a writing desk and cabinet, in the Doctor's medical office in the Alaska Building in Seattle. I inspected it at that time and saw that it was discolored where the erasure had been made. He says, "I see I am a partner of yours," and I answered him and said something—"The hell you are" or something to that effect. He said, "I have a half interest with you in that property—I have found the deed amongst my papers," or something like that—I remember he said "I have got a half interest." I don't know whether he said a half interest. I think he did, though, and I then said, "The hell you have" or something quite as surprised as that. He said: "I see I am a partner of yours in that claim up there, the Bon Voyage; I found the deed to a half interest." I then made the remark I have just told you. I was surprised to know that he had an interest in the Bon Voyage claim. You bet, I was I was more than surprised that he was claiming
151 a half interest. I had written him in April 1904, acknowledging that he had an interest in it—well, the letter shows for itself; that is my letter, that one that has been shown here. I admit that letter. I still called him in in 1904, and even at that time if he had come up and paid me the share of the assessment work, so far as I was concerned, I still would have called him

in even after that. I still called him in and acknowledged that he was still a half owner in the Bon Voyage in 1904. I didn't call on him again until the fall of 1904. I sent to him for fifty dollars for doing the work on the Bon Voyage mine, twenty-five for 1903, and twenty-five for 1904. I wanted the money for two years. That is my explanation of the fifty dollars. This was for the representing work in 1903. I had performed no work in 1904; that was for 1903. I had written to Dr. Chambers in the year 1904, that the work was done for that year, and that we were safe for another year, and that he had an interest in it, and that I had done the assessment work. I told him that I had had the work done and that he owed me fifty dollars for the two years, and he said to let it go—"I don't care to put up any more money; let it go." That is just exactly the way it was. I had executed a bill of sale to him. He said he had lost the bill of sale; that it was lost and he hadn't seen it for years, I think he said, and when he produced this bill of sale there in his office I was positively surprised, because he said he had searched amongst his records, and he said he had never put it on record, and then, when I met him again, for him to come out and say he was still a partner of mine, especially after we having been friends for years, been associated with him and been good friends for years, I certainly was very much surprised at his conduct. We were good friends up until the 24th of May, 1906. Up until he sprung this bill of sale on me, we were good friends. Up until he showed me the deed to the Bon Voyage. That was when I made the surprised remark. That is what I said and quite a good deal more in the same strain, I think. I told him right there that I had enough of him. I took the deed and looked at it and saw that a change had been made in the deed. The interest had been changed, and I accused him of making the change. The Doctor then acknowledged that he had made the change in the deed, and begged me not to say anything about it. I didn't want to make any trouble on account of the two families, his family and mine, but I told him that I didn't want to have anything more to do with a man that would do a thing like that. I told him he had told me to let it go more than two years ago. I accused him of forgery and of tampering with an instrument over my signature. I told him that I never would recognize that instrument and never would give him a cent out of it; that he had committed a forgery and that I would never have anything more to do with him, and never would recognize that deed. If I had destroyed the instrument, the instrument with the discoloration in it, it was no better than the way it was, because it was better evidence that he had changed it, and I didn't want to fool with it myself, and it had no value at all; that is the way I looked at it. I have told you why I didn't tear it up, put it in the stove or do something with it instead of leaving it with him. I couldn't see any good that it was in the condition that it was in, because it showed very plainly the alteration. I did not bring it up to Nome with me because it was really worthless to me, and I thought he would never dare go as far with it as he has; I never considered that he would

try to act ugly at all. I thought he had had enough of it the way it was. It is not a fact that the Doctor and I had our annual settlement on the 24th day of May, 1906, and discussed our mining interests in Alaska. We had a final settlement. I did not tell Dr. Chambers, at that time, for the first time that I had conveyed to Andrew Eadie a half interest in the Bon Voyage claim. I did not say anything of the kind. It is not a fact that he said to me at that time that I had deeded him three-quarters. He did not show the deed to me then and say, "Why, I have a deed to three-quarters; how could you deed away another half?" I told him in the fall when I came out—this was in the spring, this was in May afterward, and I told him in the fall when I saw him in the fall before, and I says, "Here," I says, "I gave Eadie a half interest in this claim, in one of the claims, for doing the assessment work—I don't think I mentioned which one; I may have, though. It is not a fact that he accused me of deeding away three-quarters to him and a half to Eadie, making five-quarters in all. He did nothing
154 of the kind. It is not a fact that I made the change in the deed to get out of the scrape I had got into by deeding away five-fourths of a claim. I state on my oath I did not. It is not a fact that Eadie's deed claimed for a half and Chambers' deed for three-fourths of a claim. Chambers' deed called for a quarter up until 1904, and Andy's deed called for a half. The deed I executed to Andrew Eadie, which I executed in October, 1904, called for a half interest in the Bon Voyage. Then I retained a quarter interest with him in the claim, and then I had a half interest with Andrew Eadie because Chambers abandoned his interest in 1904, and if he had a bill of sale at that time he was unable to find it, or at least so he told me, and he certainly claimed no interest in the claim. It is not a fact that at the time the Doctor, he and I being very friendly, that I sat down in Doctor Chambers' office, and talked over the affair, I discussed with the Doctor having deeded a half interest in the Bon Voyage to Mr. Eadie, and the Doctor went on and said, after I had told him about the deed to Mr. Eadie, "Why, Whittren, you have made a mistake; here is a deed to three-quarters," I should say not—nothing of the kind. Why did I want to change it if I had given him a half? That is not the reason I afterward entered into a memorandum with Dr. Chambers. I have not got to that. The reason we entered into that Doc wanted me to give him a memorandum. I told him I wouldn't do it, and then he set down and said, "Well, I will give you one," and he sat down and
155 wrote out a memorandum on one of his prescription lists, I believe it was. I said, "All right, you can give me that if you want to." I did not set down there on the 24th day of May, 1906, in Dr. Chambers' office and take some chemicals and remove the words "three-fourths" and the figures " $\frac{3}{4}$ " in my own handwriting, and write in the very identical words that are now in there today. I did not write any part of that. I am glad to say, and you can't see anything under that stain now, what you could there before. I wrote neither the one-half or the figures. I have testified that the word "one-half" was raised by Dr. Chambers to a bigger

interest in the claim. I don't know how he could have any object, if the words were written three-fourths, in reducing them to one-half. I don't see how he could want to change it from three-quarters to a half. It was one-quarter when I made the original deed in 1902; I am positive of that. I have never written under there for three-fourths. I will say that I never made any change in that instrument since April the 27th, 1902, and I don't think I have seen it. I don't think I have ever seen that instrument since April, 1902, until May 24th, either the 23d or 24th, 1906. I don't think I have ever seen that bill of sale, or whatever you may call it, since that date. I will also testify that at the time I drew up the deed I did not write, or authorize any one else to write, for three-quarters. At the time the deed was prepared it did not contain the word "three-fourths." It did contain the word "one-quarter." I know

156 Mr. W. V. Rinehart quite well. He used to practice law in Nome and is now in Seattle. I met him along about the 24th day of May, 1906. The only conversation that I had with him with reference to this particular deed at that time was had there in the presence of Chambers at that time on the 24th. It is not a fact that I stated to Mr. W. V. Rinehart, in the Alaska Building in Seattle, in Dr. Chambers' presence, the three of us being present on either the 24th, the 25th or the 26th of May, 1906, that a change had been made in this particular instrument, referring to Plaintiff's Exhibit One, now in evidence, and that the change had been made with my consent in order to avoid the drawing of a new deed, and that an express arrangement had been made between me and Dr. Chambers. I will tell you just exactly what I did say. I have got it right here, all written down. I deny positively that I ever told Mr. Rinehart anything of that kind in the presence of Dr. Chambers. This is the language I used. That was it neither in words or in substance. I will tell you exactly what the language was because I have it right here.

(Witness produces paper and reads.)

I telephoned for Mr. Rinehart to come down to Chambers' office, also that we had come to an understanding, that is, Chambers and myself, in which Chambers was not to claim anything. I telephoned to Rhinehart to come down to Chambers' office, and he sat down and wrote off a telegram and Doctor went and got this bill of sale, and he looked at it and he says, "Why this has been changed," and

157 I cast it off—I don't know just what the conversation was pertaining to that, but we passed it off by saying that we understood something about that, and we went on talking about the lease for this telegram that he had from Chilberg about the lease. I had a conversation with Mr. W. V. Rhinehart, somewhere in the city of Seattle, in the fall of 1906, after I returned to Seattle. I do not think that I stated in the conversation in words and substance to the effect that the changes made in this particular instrument that we are referring to, Plaintiff's Exhibit One, was made by mutual consent between myself and Dr. Chambers, and that they were made to avoid the drawing of a new instrument, or words to that effect.

I don't think so. I have that all down here what refers to that conversation, and I will refer to it. I don't know just exactly the date but I have it down here. I have got the exact date if you would like to know it. November 3d. Now, here is the conversation just as we had it. I have got it all down here. "The only thing that I remember about the matter was, that I was after a lease from Whittren, in answer to a telegram sent me by Eugene Chilberg, and that I saw the bill of sale Chambers was claiming under and noticed a change made with acids and called the attention of Whittren and Chambers to the same, that, as near as I can remember at the present time, one of them spoke of, and said, yes, a change has been
158 made but I don't know by whom. I told Mr. Rhinehart that Mr. Fuller may send out for his deposition during the winter to what took place as I had told all in connection about how you were brought into the case. He said he would make an affidavit for me or for Mrs. Chambers, as he had promised her last evening, but he could do neither of us any good as he could not remember what was said or done at the time, for he was after a lease and very little was said outside of that which would pertain to said lease. Also I remember that I thought you was the owner of half of the claim at the time and the other half was owned by some fellow in York or Nome, and he was to have the say as to giving the lease, and if I remember rightly I had you sign the telegram believing you to be the owner at that time. I then told Mr. Rhinehart that Chambers had started suit against me for a half divided interest in the Bon Voyage claim, and under the same instrument Rhinehart saw in Chambers' office the day he was after the lease, and the one in which he noticed the change and commented upon the same. Also that at the time I passed off this remark, with, "Yes, we understand that," in that way diverting his attention from further comment upon the same. That was because Chambers and I had just had it hot and heavy over the acid change made by Chambers over night, as he had admitted to me he had done just before I telephoned for him to come down to Chambers' office; also that we had come
159 to an understanding. This was what was said in May about the 24th or 25th, I think. The paper which I am reading from is a conversation which took place on November 3d, with W. V. Rhinehart, in the Scandinavian Bank on Second and Cherry street. I telephoned for him to come down to Chambers' office, also that we had come to an understanding, that is Chambers and myself, in which Chambers was not to claim anything under the forged bill of sale and for the reason of his having changed the same with chemicals, he was to get nothing, but Mrs. Chambers was to get one-quarter of the net proceeds, that is, if Chambers lived up to his agreement, and I was not to publish to the world about him having made the change, but if he ever broke any of the agreements, I would come out and tell the truth in the matter and would never give him or his wife or any member of his family a cent from the claim. This is a conversation which I set down at the time down at the Alaska club. This was right after I had the conversation with Chambers—this was this last fall, in Seattle in the fall of 1906. I set down this con-

versation with Rhinehart in Seattle, before I came to Alaska in the fall of 1906, for Mr. Fuller and Mr. Murane to use if they saw fit. It was with reference to his changing this bill of sale by the use of chemicals. I jotted it down at the time exactly like this. After

160 we had had this conversation pertaining to the changed instrument. When I found out that Dr. Chambers had altered this deed by the use of chemicals over my signature, I cut his friendship and ceased to associate with him from that time—that goes without saying, I think. I certainly did. I would not break bread with him in his house. I would not break bread with a man who had done a thing like that. I certainly would not break bread with a man who had done me such dirt as that. If he should invite me to go out to his home, I would not go because I had dropped his friendship, as I told him, and had ceased all friendly relations with him, and all social or friendly relations and intercourses, with him. I told him I would not go to his house when he was there. In fact it was agreed between us that I should go out to his house and call upon his wife that night, I think it was, but it was agreed that he was not to be present; I told him that on account of his wife's and my wife's associations and friendship that I would go and call upon his wife, but it was arranged that he was not to be there. I had arranged that Mrs. Chambers should not know that I had broken my friendly relations with the doctor, on her account. I told him at the time that as long as he never made any claim under the deed that I would not publish him, but if he did—I called at his house before I left for Nome, but he was not to be there; that was the understanding. I did not want her to know anything about
161 her husband tampering with an instrument, naturally. It is not a matter of fact that right after I had had this talk with him, that I went home and took dinner with him the same day; he had asked me to go to dinner that night, the night of the 24th, but I did not go. He asked me if I would not keep him posted as to the Bon Voyage claim. I had hardly landed in Nome until I wrote a letter to the Doctor, which I sent. I made good my promise to the Doctor. I couldn't say how I addressed the doctor when I wrote him. I might have said "My dear Doctor" or "Dear Doctor," just my usual formula or customary way of addressing him, the way I usually address letters. I wrote a letter on June 11th, the day after my arrival I think, June 11th.

(Whereupon a paper was produced and handed the witness.)

The WITNESS (continuing): I told you I wrote a letter on the 11th of June—this is the letter; this is the letter here.

Mr. GILMORE: We offer in evidence a portion of this letter for the purpose of showing the friendly relations existing on the 11th of June, just about two weeks after this supposed break between the plaintiff and the defendant, for that purpose only.

And thereupon the defendants objected to the introduction of any portion of the said letter, as being wholly irrelevant and immaterial.

Which said objections on the part of the defendants were overruled

162 by the Court, to which ruling of the Court each of the defendants then and there excepted, which exceptions were allowed; and thereupon the said letter was marked "Exhibit No. 4," and the reading of the body of the letter, being duly waived, with the exceptions of the words at the heading "My Dear Doctor," and closing "Ever you- well-wisher," which were read to the jury.

Mr. GILMORE: We offer this letter in evidence for the same purpose.

And thereupon the defendants objected to the introduction of the said letter, as being wholly irrelevant and immaterial.

The WITNESS (continuing): That letter is in my handwriting.

Whereupon another paper writing was produced and handed to the witness:

The WITNESS (continuing): I did not sign "your friend" there to that note.

Which said objections on the part of the defendants were overruled by the Court, to which ruling by the Court each of the defendants then and there excepted, which exceptions were allowed; and thereupon the said letter was marked "Exhibit No. 5," and was read in evidence to the jury.

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PLAINTIFF'S EXHIBIT No. 5.

Letter, June 11, 1906, Whittren to Chambers.

Office of J. Potter Whittren,

U. S. Deputy Mineral Surveyor and Consulting Engineer,

NOME, ALASKA, *June 11th, 1906.*

Dr. J. J. Chambers, Seattle, Wash.

MY DEAR DOCTOR: This is Sunday and we arrived yesterday afternoon after a fair voyage.

Went out to our claim, the "Bon Voyage," early this morning and spent the afternoon looking over the country and seeing what our chances for being on the paystreak.

Nothing so far has been struck on our claim so far as I can make out; but we are in line with the pay as located on both sides of us.

Mr. Chilberg and others interested in the lay from Otto Hall who has jumped the property went to bed rock and drifted about 30 ft. so they say, before finding the claim was mine. They quit work at once and are trying to get a lay from us; but Eadie our partner in the claim wants to put his steam thawer on the claim and locate pay, for he was to do that as per agreement for half interest, in that way his title will be perfected.

Then again Mr. Chilberg expects a 75% lease, and we can do better, I'm sure, so will not do anything for a few days and let Eadie go

164 to work and locate pay the bed-rock is 120 ft., so the parties working under Halla say, but I don't believe in that depth.

The way I size up the situation at the present time is that we have a good chance for making a "home stake" out of the claim but can expect nothing until next spring, then again it may prove a blank; but the chances are in favor of getting even with the country for the hard raps it has given us.

"I'm going to do engineering work and make all the money I can, and if the claim develops into a paying proposition between now and the fall will write or wire you the news.

It looks brighter now than it has since being in the Nome District for a home stake.

Ever you- friend and well-wisher,

J. POTTER WHITTREN.

The WITNESS (continuing): After I had had a trouble and quarrel on the 24th of May, 1906, of the same year in Seattle, with the Doctor, I addressed him "My dear Doctor," instead of "My dear sir," for I have always used that as a matter of form, "My dear Doctor," is equivalent to "My dear sir." I didn't say "My dear sir," because it is mere matter of form of address. This letter was written about two weeks, a matter of twenty days or so, after I had had this trouble with the doctor in Seattle. I did not write him as though nothing had passed between us. When I signed this letter

165 "ever your friend and well-wisher" I did not feel just as friendly toward him as I ever had until before the 24th of May. Those letters show for themselves, and it was also for

the purpose that he could show them to his wife, if he wanted to. I did not write the letters that way so that he might exhibit them to his wife and deceive her with regard to your relations, but it was to carry out the idea. When I wrote him "ever your friend and well-wisher," it was for the purpose that he might take it home and show it to his wife, and she need know nothing about the rupture between us; that was the point for Doc to carry out, and when I left Seattle, the agreement was I was to keep him informed of everything and Mrs. Chambers would not know that things were different between us. The letter speaks for itself as to the statement: "Eadie, our partner in the claim, wants to put a steam thawer on the claim and locate pay, for he wants to do that as per agreement for half interest; in the way the title will be perfected." It is not true that he was to put his thawer on the claim and locate the pay before I gave him his deed. He was to have a half interest in the claim for doing the work; he had had his deed over a year ago. I did not discuss the matter on the 24th of May, 1906, and did not tell Dr. Chambers that in order to make Mr. Eadie out his deed, he was to locate the pay on the claim under my agreement with him, saying to him that Mr. Eadie was to locate the pay before he could get the title. I have never said anything of the kind what-

166 soever. I say "our claim" in this letter, though Mrs. Chambers was the one to get the royalty, because I suppose I had said "her claim" and she had seen the letter. My explanation is that I wrote it here "our claim" in this letter so that he could go and

show it to his wife. As a matter of fact, she was to know nothing about the change in our relations and I was doing my best to live up to our agreement that I had made with him in his office and write in everything I learned about the claim. I was just carrying out the agreement that I had made. It is a fact, in a way, that it was the understanding with me when I wrote that letter "our claim" I did it so that if he wanted to he could show the letter to his wife, and that is the reason I wrote "Our claim" and "our partner." That is the only reason.

(Whereupon the witness is handed another paper writing.)

The WITNESS (continuing): I can't tell whether I signed this or not. I would like to see the other page first. That is my signature. I presume I wrote that letter; that is my signature; I wish to read it over first. I can't say whether or not it is my letter until I have read it over. Yes, this my letter.

Mr. GILMORE: We offer this letter in evidence for the same purpose.

And thereupon the defendants objected to the introduction of the said letter, as being wholly irrelevant and immaterial, and for
167 the reason that it does not tend in any way to contradict the witness.

Which said objections on the part of the defendants were overruled by the Court, to which ruling of the Court, each of the defendants then and there excepted, which exceptions were allowed; and thereupon the said letter was marked "Plaintiff's Exhibit No. 6," and was read in evidence to the jury, and was in the words and figures following:

PLAINTIFF'S EXHIBIT No. 6.

Letter, June 14, 1906, Whittren to Chambers.

Office of J. Potter Whittren,

U. S. Deputy Mineral Surveyor and Consulting Engineer.

Surveys for Papents,
Estimates and Grades for
Ditches and General Engineering.

NOME, ALASKA, *June 14th, 1906.*

J. J. Chambers, M. D., Alaska Bldg., Seattle, Wash.

MY DEAR DOCTOR: I have written you two letters since my arrival here in Nome, was in such a hurry that I may have overlooked a few things pertaining to our claim ("Bon Voyage") so will state in full here just how matters stand.

Upon my arrival here in Nome, about ten different fellows approached me for lays or leases on the "Bon Voyage," and Eugene Chilberg, of The Miners & Merchants Bank, told me he had per-

formed work upon the claim to the extent of one thousand (\$1,000) dollars, during the winter under a lease from Otto 168 Halla. That a shaft had been put to bed-rock a depth of 120 feet. A drift driven 30 feet from the shaft. Several drill holes put down before they found any pay. Or at least they told me they did not find pay; but they knew where to put down a shaft and tap the pay. I would have given them a lease on 220 feet of the paystreak, provided they gave me a bond to turn over all the royalties to us and receive 65 per centum for their work; but they expected 75 per centum so the matter stands that way at the present time. I don't believe we will give them a lay; but wait until Frank Waskey gets his hole to bed rock and see what kind of pay, if any, he finds.

Mr. Wasker, as I stated to you in my letter the other day has a lease on 220 feet along the westerly side line of the claim, and he has to get started by the 16th of June and continue winter and summer until the 1st of June 1908. If he fail to work continuously, or stops work for a period of ten (10) days during the term of the lease he forfeits the same.

Mr. Waskey is considered the best mining man in this vicinity and we are to be congratulated in getting him to take a chance with us on the claim. He estimates the cost of putting down the shaft at one-thousand (\$1,000) dollars, and if he should find any pay we can secure better terms on the next lay we let. All things being equal believe we will give him a chance on another lay or more ground; but that will have to be determined after pay has been located, for we may find a blank, and we don't want to build our 169 hopes too high, for the fall will be all the greater, should we hit the down grade.

I'll keep you posted right along and don't believe we can expect any more than to have the pay located during the summer, for there is no water to sluice out there on the tundra should pay be found, but if we ever find a pay streak, and it is of any extent, we should commence to reap our reward next spring.

Remember me to all the folks and write as often as you can. Will answer any and all questions should I fail to explain so you can understand.

Ever your friend and well-wisher,

J. POTTER WHITTREN.

The WITNESS (continuing): This letter is dated June 14, 1906. The letter shows for itself that it begins "My Dear Doctor." It is not a fact that when I wrote that letter on the 14th of June, 1906, that I was just as friendly with Dr. Chambers as I was prior to the 24th of May. I have no explanation to make why I signed it "Ever your friend and well-wisher," and began it "My Dear Doctor," except what I have already stated. I have already stated why I said "our claim" in that letter. The purpose for which I wrote "our claims" in the letters heretofore offered, was to carry out my agreement with him so in the event he lost the letters or cared to show them to his wife, I proposed to carry out my agreement with him and not to change continuing addressing him in the same manner.

(Whereupon the witness is handed another paper writing.)
170 The WITNESS (continuing): Yes, that is my letter, without reading it over.

Mr. GILMORE: We offer this letter in evidence, if the Court please, for the same purpose.

And thereupon the defendants objected to the introduction of the said letter, as being wholly irrelevant and immaterial, and for the reason that it does not in any way tend to contradict the witness.

Which said objections on the part of the defendants were overruled by the Court, to which ruling of the Court, each of the said defendants then and there excepted, which exceptions were allowed, and thereupon the said paper writing was marked "Plaintiff's Exhibit No. 7" and read in evidence to the jury, and was in the words and figures following, to wit:

PLAINTIFF'S EXHIBIT No. 7.

Letter, June 21, 1906, Whittren to Chambers.

NOME, ALASKA, *June 21st, 1906.*

J. J. Chambers, M. D., Seattle, Wash.

DEAR DOCTOR: It seems as if we were going to have all kinds of trouble on the "Bon Voyage," as several locations were made during the winter taking in our ground, and on the 19th of this month W. J. Rogers of the North Western Commercial Company jumped our claim. I know we have a perfect title to the claim, for not only has the work required by law to hold the property been performed every year, and recorded; but the shafts are there to show for themselves, and are so placed as to be seen from the corners.

171 I understand that Mr. Rogers is going to put up a fight on the ground that we did not make a discovery upon the claim; but as near as I can make out it is a case of blackmail and sour grapes. He is one of the nine men who had a lay, or lease, upon this ground from another jumper named Otto Halla, and when we could not give them a lease, Mr. Rogers thought we had not used him right, and told me he jumped our claim for that reason, and was going to give us a run for our money.

I would have given the boys a lease, if our partner, Mr. Eadie, who owns the other half, had not objected to it on account of Rogers, or the North Western being one of the party; but he has no use for the outfit, for reasons of his own, and would not think of giving them a lease.

I informed the parties who had a lease from the jumper Halla, that it was out of the question to give them a lease and all but Rogers, Densmore and I believe a brother of Rogers, realized I had done all I could for them and let the matter drop; but felt a little put out at not being able to secure a lease on part of the ground. It was during the afternoon of the 18th that I told them they could not have a lease for reasons above explained, and on the 19th Densmore and Rogers went out and jumped the claim.

As it looks like a fight and we will have to put up a few hundred for a law suit, have come to the conclusion that we must be on the defense when action is taken. Mr. Eadie and myself agreed last evening to give a lease to Waskey and Eadie on the balance of the claim. Mr. Waskey, as I have written before, has a lease on one-third ($1/3$) of the claim at sixty-five (65) per cent; but to get him to go to work and put down another shaft timber and work the same winter and summer, he would not take it less than seventy-five (75) per cent, for he has to divide with Eadie, and do all this before he has the pay located, and protect the claim by covering all the ground where the pay is supposed to cross.

I have spoken to several good men with respect to taking the lease and protect the ground: but all of them said it would cost too much to put a shaft down at the present time, on account of the depth and timber it would require. They all expected seventy-five (75) per cent, and would wait until winter, when they would not have to timber to work the same, so we came to the conclusion that we had better let Mr. Waskey have the lease on the other two thirds ($2/3$) and to go to work at once, which he has and to work winter and summer, and keep off jumpers.

Mr. Waskey wishes me to write you and have you agree to the leases as stated, for he has had a little trouble where all parties or owners have not agreed to the lease, so if you will write a letter by return mail and state that you will stand by what we have done in the way of letting the lease, it will make things "O. K." all around and there will be no cause for any discontent with the owners and lay man, for we may have a hard fight on our hands and must be together.

Trusting to hear from you by return mail, I beg to remain your friend and well-wisher,

J. POTTER WHITTREN.

Whereupon Mr. Fink moved that all of that part of the letter with reference to Waskey requesting him to write: (Reading) "Mr. Waskey wishes me to write you and have you agree to the leases as taken, for he has had a little trouble where all parties or owners have not agreed to the lease, so if you will write a letter by return mail and state that you will stand by what we have done in the way of letting of the lease, it will make things O. K. all around, and there will be no cause for any discomfort with the owners and laymen, for we may have a hard fight on our hands and must stand together," be stricken out as it is not binding on Mr. Waskey in any way and is not proper cross-examination.

Whereupon the Court instructed the jury as follows: "We instruct the jury at this time that they are not to regard this evidence as binding upon Mr. Waskey; it is not offered for that purpose; you have no reason to consider any other purpose, only the one purpose, viz, to show the friendly relations still existing between Dr. Chambers and Mr. Whittren and no other purpose.

The WITNESS (continuing): When I wrote this letter on the 21st

of June, 1906, I was not just as friendly with Dr. Chambers as I was prior to the 24th of May, 1906. When I wrote Dr. Chambers and signed myself "your friend and wel-wisher" and when I addressed him "Dear Doctor," my relations were not just as friendly and pleasant between he and I as they were prior to the 24th of May, 1906. That letter was to be shown to Mrs. Chambers. For that purpose only. You will notice that in all of the letters
 174 that you have shown here yet, they are signed "Your friend and well-wisher," all of them.

(Whereupon a paper writing was handed to the witness.)

The WITNESS (continuing): That is my letter. I wrote it.

Mr. GILMORE: We offer this letter in evidence, if your Honor please.

And thereupon the defendants objected to the introduction of the said letter for the reason that it does not tend in any way to contradict the witness, and is incompetent, irrelevant and immaterial.

Which said objections on the part of the defendants were overruled by the Court, to which ruling of the Court each of the defendants then and there excepted, which exceptions were allowed; and thereupon the said letter was marked "Plaintiff's Exhibit No. 8." was read in evidence to the jury, and was in the words and figures following, to wit:

175

PLAINTIFF'S EXHIBIT NO. 8.

Letter, August 6, 1906, Whittren to Chambers.

Office of J. Potter Whittren,

U. S. Deputy Mineral Surveyor and Consulting Engineer.

Surveya and Patents,
 Estimates and Grades for
 Ditches and General Engineering.

NOME, ALASKA, August 6th, 1906.

J. J. Chambers, M. D., Alaska Building, Seattle, Wash.

MY DEAR DOCTOR: Mr. Wintermantle is leaving for the outside today, so will take advantage of sending a letter to you by him as he can give you all the late news of this part of the country and of our claim the "Bon Voyage," also you can send any material you wish back by him, and I'll see him on his return.

As you have learned by this time thro Captain Watson, we reached bed rock in the first shaft a week ago Saturday, or the day he left Nome and found nothing but fine colors. We started to drift to the north thinking we are too far south to catch the main beach streak by some thirty feet, and are at the present writing some 18 feet in with our drift. It may be we are too far north and will have to drift to the south, or are on a barren spot where the present shaft is and will have to keep drifting until we find pay.

We tho't for a while we were getting onto the streak for five feet in the present shaft could get pans as high as six cents in the bed-rock; but it has remained about the same and fails to get better as we go ahead.

176 Shaft No. 2, seems to be a bad one, and goes down very slowly. At the present time they are down some forty feet in it. It would sluff and sluff for the first 25 feet even with the timbers, and large rock prevents the points from being put down any great distance at a thawing. This is being put down on the lease of Waskey and Eadie, and will take three more weeks to get it to bed rock; but if there is any pay in the claim this should go right down on it, as it is in line with the pay located by the drill last spring.

A tundra fire destroyed three of our corner stakes last month, but as I have made a survey of the claim in 1903, and had a complete set of field notes, it was no trouble to locate the bottom of the burned stakes with the transit and chain. Have replaced all the burned stakes and fixed up the monuments so the claim is well marked again.

You write about coming up to spend the winter but as there is little work for one of your profession and you have a good practice down there believe you had better wait until next spring, then you may have something to return for, as I believe we will have all we can do to locate the pay this fall. If not detained by a law suit will return to the States about the middle of Oct., and leave the claim to Eadie and the laymen, with my attorney Mr. Fuller (commissioner) to look after my and your interest, and know all will be well.

177 Will let you know when we find any pay, and keep you posted from time to time as to progress.

Yours very truly,

J. POTTER WHITTREN.

The WITNESS (continuing): I wrote this "Yours very truly" because that is equivalent—that is just the same thing—it means just the same thing about as "your well-wisher." All the other letters show for themselves what I have written. Things had not begun to change when we dropped on the pay streak, that had nothing to do with it; he had written me asking about the outlook, and asking if he would do well to come, and I merely answered him. I wrote him what the letter says there. It is not a fact that as soon as I began to get a little better prospects my attitude began to change, not in the least; I think all the letters I wrote him that summer will show that I carried out my part of the contract, and kept him informed. My first letters speak for themselves as to how I began them all. When I began to get a little better prospects, I did not begin to stand him off. I think the jury has seen all the letters you have introduced and they will speak for themselves. I received replies to some of these letters after I wrote them. I have not those replies here. It is possible if any are in existence, my attorneys have them; I turned them over to them last fall.

(Whereupon a letter or paper writing is produced, and handed to the witness for examination.)

Mr. GILMORE: I offer this letter in evidence for the same purpose.

178 And thereupon the defendants objected to the introduction of the said letter for the reason that it does not in any way tend to contradict the witness, and is incompetent, irrelevant and immaterial.

Which said objections on the part of the defendants were overruled by the Court, to which ruling of the Court each of the defendants then and there excepted, which exceptions were allowed; and thereupon the said letter was marked "Plaintiff's Exhibit No. 9," was read in evidence to the jury, and was in the words and figures following, to wit:

PLAINTIFF'S EXHIBIT NO. 9.

Letter July 20, 1906, Whittren to Chambers.

(Written in Duplicate.)

NOME ALASKA, *July 20th, 1906.*

J. J. Chambers, M. D., Alaska Building, Seattle, Wash.

My DEAR DOCTOR: YOURS of the 5th inst., at hand. In reply will say that if you were in a position to know how matters stand up here, you would never have written a letter like the one just received. Realizing that such is the case, will overlook said letter, and you must remember that a letter reads at times much different than the writer wishes to express himself.

I wish to inform you that for reasons explained in my letter of June 21st, and to be further explained in this letter, that Mr. Eadie and myself have let a lay upon the claim, in fact two lays, leases, which covers the whole claim, and as you may know
179 by this time I never go back on my word, which you are indebted for your interest in the claim herein under discussion, viz, "The Bon Voyage," and I propose to stand by these leases, or lays, through thick and thin, as Mr. Waskey is working out on the claim under said leases, under great expense, which you, Eadie and myself are not in a position to do at the present time.

The lays are just as explained in my letter of June 21st, that is the first lay to Mr. Frank Waskey, for the first westerly 220 feet of said claim, and we are to receive thirty-five (35%) per centum of all the gold extracted from said claim.

The second lay is for the balance of said claim, or the 440 feet to the eastward of said first lay to Waskey. This lease is to Andrew Eadie and Frank Waskey, for which we will receive twenty-five (25%) per centum of all gold taken from said claim.

If you will recall the telegram we sent to Mr. Eugene Chilberg, a copy of which can be obtained from the telegraph company here and in Seattle, Wash., I as manager in the handling of said property, wired Mr. Chilberg that a lay for seventy-five (75%) per centum would be agreeable to me; provided agreeable to my partner Mr.

Eadie. Being in Seattle and out of the country for some seven months, I was not in a position to size up the situation and it was the understanding that the same should be passed upon by Mr. Eadie before we did anything.

180 When Mr. Eadie turned up in Seattle, I told him what I had done, believing he was in Nome, and he told me we could do nothing until after our arrival. That was how matters stood, and we knew nothing about some nine men having a lease from the jumper Otto Halla at the time, for the telegram led us to believe Mr. Eugene Chilberg had the lease, and he alone.

Upon our arrival here in Nome and having sized up the situation the best we could, and giving the same several days' consideration, we were of the opinion that some of the men interest in the lay from Otto Halla, the jumper, were partners of his, and no doubt we were right to a certain extent, for one W. J. Rogers, of the North Western Commercial Company, went out and jumped the claim, which proved him to be in "Otto Halla's class, and an animal of the same stripe. Also Mr. Eadie and myself came to the conclusion that it was very poor policy to let a lay to a man who had succeeded in getting the people of Seward Peninsula, especially the miners, down on him to the extent that Mr. Rogers had.

Again I would have liked to live up to the understanding we had of giving a lease to Mr. Chilberg, that is, if Eadie was willing, had they been willing to accept a lease for less than seventy-five (75%) per centum; but they would have that or nothing, and we have made ten per centum by letting part of the claim to Mr. Waskey.

181 The reason that the second lay was let to Mr. Eadie and Frank Waskey for the balance of the claim may not have been explained fully in the letter of June 21st, so will state here that we discovered the shaft being put down by Mr. Waskey did not come on the ground claimed under the Halla location as it covers the Bon Voyage kind of diagonal, under the name of "The Golden Bull." It was necessary that we take possession of the whole claim to keep other jumpers off, and as Mr. Eadie's steam-thawer had not arrived I agreed that he and Waskey could have a lease upon the balance of the ground, provided they went to work at once and kept working all the time winter and summer. They started a shaft on the ground claimed by the jumper, Halla, the very next day.

A few days ago Otto Halla went out and ordered the men to quit working in the shaft being put down by Waskey and Eadie; but they are in possession and will remain so until ordered to stop by the Court.

As to the Rogers location, Mr. Frank Waskey relocated the claim ahead of him, for he never takes a lay upon a piece of ground without jumping the claim for protection, and he gives a deed to the party from whom he receives the lease. It has cost him so much in law suits of late, that he believes in taking every precaution to protect himself, for he finds it costs money to find out anything by law.

At the present time it looks as if we will have to put up some money for lawyers—and I wish you would send direct to me, or to The Miners and Merchants Bank of Nome, say three-hundred and fifty (\$350.) dollars, to protect your quarter interest in
182 said Bon Voyage, and if that is not enough will draw upon you at Seattle, for any amount that may be needed. Should there be any left over, will refund the same to you at Seattle, with vouchers for the amount expenses.

As to Mr. Eadie having to prospect the ground for his half interest, that is a personal matter with him, for he has a deed to an undivided one-half ($\frac{1}{2}$) interest, which was made out to him last year.

After all has been said, I believe when you come to consider that you own an undivided one quarter interest in the claim, through an act of friendship upon my part, for you have never put up for the representing and the only money have paid out for the four years we have held the property is \$2.50, the price of recording the same, you must admit your quarter was had for a bargain.

Again you know that you did not know anything about your interest in said property until I came to you last spring and told you about having received a telegram through W. V. Rinehart, Jr., from E. Chilberg, for you thought as you had paid nothing for years, or since the claim had been staked, towards having the same represented, you had no interest in it. I could have had the claim relocated by some fellow and received an undivided one-half interest instead of paying out \$100, in the form of work the first year, then giving up a half interest the second, to have it represented, then
183 helping to do the work the third, all this, and only have a quarter in the claim. Again, if I had not surveyed the claim while it was a "wild cat," we would have no more claim than a "jack rabbit" today, for all the claims have been staked and restaked in that vicinity, and the stakes have been moved this way and that during the different relocations; but as our claim was surveyed our stakes have held.

All this has been reviewed just to prove that you have no kick coming when we are working for your interest; in fact, have held your interest when you thought it was not worth putting up the money for, and you are to be congratulated in having a partner who was fool enough to put up for you until the claim had a prospective value.

As I have written in my last letter we must stand together to protect our interests, and be united in the common cause for protection, in fact, there should be no contention between the three partners, and I trust you will be able to see that all has been done for the best, as I cannot go back upon my word to Waskey after he has been to the expense of several thousand dollars and held possession of the property for us when we did not have the money to go ahead with.

At the present writing we are down some 90 feet in one shaft, and perhaps twenty in the second. We have nothing in sight at the present time outside of what was discovered with the drill dur-

ing the spring, and the men who are working under a lease from the jumper Halla, said they got as high as twenty cents to the pan, nothing to set the World afire over.

184 If you think your interest is in danger, by all means come up here and look after the same; but as Mr. Eadie expects to stay in here and work his lay with Mr. Waskey during the winter, I will, if not detained by law-suits, return to the States for the winter, as Mrs. Whittren and the baby will not be able to return or come North this fall. I will leave my interest in the care of my attorney who looked after my property last winter, and feel that all will be well.

Trusting that you will see matters in a different light, and that you will send by return mail the money we expect to need soon for the trouble, which is looming upon the horizon, and that you will realize your interest will be as well taken care of in the future as it has been in the past, I beg to remain,

Yours truly,

J. POTTER WHITTREN.

P. S.—Mr. Andrew Eadie was in from the claim yesterday when I received your letter, and I let him read the same. All letters written by you to me pertaining to the "Bon Voyage" will be shown to him, for he is our partner and owns the controlling interest in the claim. All our acts with one another must be free and above board.

J. P. W."

Whereupon the witness continued: On the 20th of July, 1906, at the time I wrote this letter, I did not have a letter from Dr.

185 Chambers in my possession informing me in words and substance that he did not understand the letters or the leases which I had referred to in my letters. I had a letter directing me to throw down Eadie in these leases. I did not have a letter from him in words and substance that he would not stand by these leases that I had let. I had a letter, as I tell you, directing me to throw Eadie down on this lease. Not that he was half owner in that ground and that he would not stand for the leases; no, sir, the letter speaks for itself. I said in this letter here, "In fact have held your interest when you thought it was not worth putting up the money for and you are to be congratulated in having a partner who is fool enough to put up for you until the claim had a prospective value," because, as I have told you heretofore, I had agreed to give to his wife a half, or 25% of all of my royalties out of the claim. As far as he was concerned he had no interest in the bill of sale whatever. I meant by "After all has been said I believe when you come to consider that you own an undivided one quarter interest in the claim through an act of friendship on my part," well, because he had made, he practically had abandoned this claim from the very first because he said it was a wildcat and for me to let it go, but after all I had done on it, and still, after all that, had counted him in by giving a quarter interest in the royalties to his wife. I

think it speaks for itself what I meant by saying, "If you think your interest is in danger by all means come up here this fall and look after the same." I think I have explained what I
 186 meant when I wrote: "All this has been reviewed just to prove that you have no kick coming when we are working for your interest; in fact, have held your interest when you did not think it was worth putting up the money for, and you are to be congratulated in having a partner who was fool enough to put up the money for you until the claim had a prospective value." I don't think there is anything in that to be explained. I told him, it amounts to the same thing in that letter—what I meant by that was that his wife was to get twenty-five per cent of this claim and I wrote him to the effect that we had been looking after his interest taking care of his interest, and that virtually he would get through his wife a quarter interest, which was just as much interest as I was getting. When I wrote this letter telling him that I held his interest and had taken care of his interest, referring to it as his interest all the way through, I thought that he might want to show it to his wife—in fact, whenever I wrote to him I used the same terms that I had written to him before so that he could show it to his wife if he wanted to. And this is why I wrote this letter in that way.

(Whereupon the witness was handed another letter.)

The WITNESS (continuing): I know whose letter that is; it is Dr. Chambers'. It is not in fact the letter which I was answering in this letter which was just read. I don't think it was the letter to which I was replying in my last communication to the Doctor.

That is the original letter—that is not a copy and neither
 187 is this one. That is the original letter. There is something in there of an attempt to throw down Eadie. He commanded me to eat Eadie out. This is the letter which I refer to when I say that he ordered me to throw Eadie down. That is not the letter which I referred to in which he told me to throw Eadie out; there were two letters written on the same day. It is a part of that same letter, there were two letters written by Dr. Chambers on the same day; they were enclosed in the same envelope and I received them in the same envelope.

Mr. GILMORE: We offer this letter for the purpose of showing all the correspondence between these parties, and also for the purpose of contradicting the witness with reference to a statement in the letter ordering him — "throw Mr. Eadie down."

And thereupon the defendants objected to the introduction of the said letter for the reasons, that it was irrelevant and immaterial, and a self-serving declaration on the part of a party to the action, and for the further reason that there is no statement in this letter about "throwing Mr. Eadie out."

Which said objections on the part of the defendants were overruled by the Court, to which ruling of the Court each of the defendants then and there excepted, which exceptions were allowed, and thereupon the said letter was marked "Plaintiff's Exhibit No. 10," was read in evidence to the jury, and was in words and figures as follows:

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PLAINTIFF'S EXHIBIT No. 10.

Letter, July 5, 1906, Chambers to Whittren.

Dr. J. J. Chambers,
601-602-603 Alaska Building.

SEATTLE, WASH., July 5, 1906.

MY DEAR WHITTREN: Your letter of June 21st to hand. In reply will say that you and Mr. Eadie both agreed that you would treat the people who put down the hole fair, and now deliberately go to Nome and because Mr. Eadie don't like one man out of the nine in the company refuse to give them the consideration due them and agreed upon before leaving here. I am extremely sorry to say I cannot indorse the proposition as meagerly outlined in your letter in reference to the lay suggested by you.

You say Eadie was to represent and *locate pay* for his interest, let him go out and locate pay and protect the claim & then will be the time to consider who or whether we will give a lay to any one or not. Not only that but—Well, I will be up on the last boats to spend the winter so there is no use in going into details. I think you had better stay in if possible & let us look after the claim and try and make some money out of it, provided it is there & if not just keep on trying. I am awful sorry to write you as I have, but you surely have made a blunder, "Whit."

Let me know soon if you can remain in for the winter.

189 If you have in contemplation any contracts please send me a copy so I may know the details, time to run etc.

Yours truly,

J. J. CHAMBERS.

The WITNESS (continuing:) That is the letter which was marked "private" and came to me individually, not for any one else to see. Both letters in the same envelope, yes, sir. I referred in my letter that I was going to show Mr. Eadie everything that was written, open and above board, and I showed Mr. Eadie this letter which was marked "private," to me.

Mr. GILMORE: In connection with this letter and as explained by the witness, we desire to offer now the second letter dated July 5, 1906, in evidence, identified by this witness.

Whereupon a letter is produced, marked "Plaintiff's Exhibit No. 11," and read in evidence to the jury, and was in the words and figures following, to wit:

PLAINTIFF'S EXHIBIT No. 11.

Letter, July 5, 1906, Chambers to Whittren.

Dr. J. J. Chambers,
601-602-603 Alaska Building.

SEATTLE, WASH., July 5, 1906.

Private.

MY DEAR WHITTREN: I had a long talk with Rogers today & I think the best thing to do is to get together—let them have a lay on part of the claim? if possible & I can take a lay on part of
190 it and Eadie on part of it, something on that line—all those people are friends of mine & I don't anticipate any trouble. We can't afford to let Eadie plunge us into litigation just because he don't like some of our friends.

I think it advisable to cut out any contracts Eadie has made & lease the claim clear of all contracts of any kind & as soon as I come up in the fall fix up matters on a fair basis for all parties concerned.

Let me know as soon as possible what you think of the proposition.
J. J. C.

Whereupon the defendants moved to strike out both of these letters as having been written by Dr. Chambers, and as being irrelevant and immaterial, and not binding upon the defendants, and because they are self serving declarations and statements made with reference to the litigation, and not a part of the cross-examination of this witness, the witness having stated nothing in his direct examination of which this could be proper cross-examination, or in regard to the matters therein set forth.

Which said motion on the part of the defendants was overruled by the Court, to which ruling of the Court each of the defendants then and there excepted, which exceptions were allowed.

The WITNESS (continuing:) I answered these letters the same day I received them, I think. My letter in reply is dated the 21st day of July. That is the long letter written in duplicate. The reason that I made them in duplicate was that after the work
191 I had seen of the Doctor's, I think I had reasons to make them in duplicate. You may put it that way, if you want to, that I did it as a sort of precaution. It is not so that until that time I had signed all my letters "your friend and well-wisher," but at that time I began to sign myself "Yours truly." It is not so that up to the time Dr. Chambers wrote me that these parties were all friends of his and that he could not afford to spend money in litigation that I had never taken any such precautions to write my letters in duplicate and had not signed my letters to him "Yours truly." That was the first time that doctor had broken his word in connection with this matter after I left Seattle, and after the 24th of May, when I had the break with him about the altered deed, but

he had already broken faith with me on the 24th of May, just the same. I had broken friendship with him on the 24th of May in Seattle, in 1906. I do not remember that that was followed by a letter in August, sometime about the 20th. After he had broken faith with me, I came right out and open. I became so incensed with the doctor that I decided that I would come right open, free and above board, when he asked me to throw Eadie down, when he came out and wanted me to throw Eadie down. In that letter that you have just read he implied that he wanted me to throw Eadie down; whether or not he expressed himself in these words is for the letter. That is all the letters that I know of that I ever got from Dr.

Chambers in which he told me to throw down Eadie, the one
 192 you have just read here, and in this letter is where I say he told me to throw Eadie down, because he told me that I had to cut out any laws or contracts that Eadie had made; that we would not stand for his contracts. I do not know whether I got a reply from Dr. Chambers to the letter of July 20th, the one marked "Duplicate" or not. Mr. Fuller has all my letters and communications in regard to this matter and he will tell you no doubt, if he has a letter after that; I don't know.

Mr. FULLER: I don't think so.

(Whereupon a paper was handed to the witness.)

The WITNESS (continuing): I know in whose handwriting this paper is. I have a letter dated August 9th from Dr. Chambers. I have seen this letter, the original letter of which this is a copy.

Whereupon the original letter was produced by Mr. Fuller.

The WITNESS (continuing): I know whose letter that is; it is Dr. Chambers'. It was written by him and received by me.

Mr. GILMORE: We offer this letter in evidence for the same purpose, going to show that the rupture took place between the plaintiff and defendant in the summer of 1906, and not in May at Seattle, as the defendant says it did.

The WITNESS (continuing): Yes, it states that it is received in reply to the long letter sent to the doctor, marked "In duplicate." In reply to the letter of July 20th, marked "In duplicate." No, this one is not—I don't think; my long letter was July 21st; this
 193 is July 19th. My long letter was dated July 21st, if I remember right. You have it there; it is easy enough to tell if it is a fact that I wrote the letter on the 19th of July, dated it in Nome on the 20th, but put it in the postoffice on the 19th, and simply made a mistake in the dates. It is easy enough to tell whether that is correct or not, I don't remember. Let me see the letter; you can identify the envelope easy enough; I couldn't answer that without I saw the letter; it was a mistake if I did. I might have written the letter on the 19th, and dropped it in the postoffice on the 19th but dated it at the heading July 20th. I was writing right along there sometimes, and I might have made a mistake in my dates. This letter was written in reply to the one which I wrote on July 20th or 19th. This letter, it says, "Yours of July 19th"—I guess this is

the letter all right; I wrote it the night of the 19th but dated it the 20th, all right. There is *naother* letter than that too, I think, not both written on the 19th, but is there not also one of the 21st. I have been so liberal with my correspondence that I cannot now say how many letters I did write to Chambers. I wont say that there is another letter besides this one, but it sems *ot* me that I wrote one on the 21st; I may be mistaken but that is my recollection now. This is a letter written by Dr. Chambers to me.

Mr. GILMORE: We withdraw the offer of this letter at this time, and introduce it in our rebuttal.

The WITNESS (continuing): With reference to the open
 194 rupture between myself and Dr. Chambers, that started on May 24th, 1906, in Seattle; that was when the open rupture took place, or when the rupture took place. I didn't speak to him after that until last fall; we did not speak after he came in. That was sometime in September, 1906, after he arrived in Nome. Soon after he arrived in Nome, I met him on Steadman Avenue and told him—we had some bitter words down there, if that is what you are trying to get. There was a row between us on May 24th in Seattle. I have explained about writing him friendly letters. There had been an open rupture between us in Seattle. I did meet him soon after he came in to Nome and accosted him down there on the street. I don't deny that. The row I told you took place in Seattle May 24th, 1906, long previous to this street row. Dr. Chambers broke faith with me when he agreed that he would never make any claim to any interest in this property, then when he laid claim to a half interest in this property. I have already told the circumstances connected with this memorandum which has been offered in evidence. He wanted to give it to me and I took it. The first time I saw him after he came to Nome, he came up—we met down here on Steadman and he put out his hand and wanted to shake hands; I refused to shake hands with him and we had some hot words, and that was about all there was to it. I don't think I ever intended to fight him. We had a few words there. He did not offer to shake hands with Eadie. Eadie and I were together; he offered
 195 to shake hands with me; I told him I would not shake hands with him; he then, I think, tried to shake hands with Mr. Eadie. I said "Do you suppose I would shake hands with a man who had done as he had?" Well, he said he would like to have an understanding or something about the lay, I think he said, and then I think he turned to Mr. Eadie. I think he said that he admitted that he had done the work, but that I knew all about it, or I was there. I don't remember just the exact words, but to that effect. I don't know what Mr. Eadie did. I refused to shake hands with him—do you think I would shake hands with a man who had done me such a trick as that? I did refuse to shake hands. I claimed all along that I owned a half interest in the Bon Voyage claim. I had deeded Mr. Eadie a half. I knew after May 24th that a deed from me to Dr. Chambers was in existence, prior to that time I did not know whether it was or no, because I had his word for it that it was not in existence; it was not on record, and he claimed that if

I had ever given him one that it had been lost or destroyed; it was certainly not in my possession. Prior to May 24th, I knew that there had been both deeds, but between the date of the deed to Mr. Eadie in 1903 and May 24th, 1906, all I knew of the matter was what Chambers said, and he told me that there was no such deed in existence; he pretended that he had made a diligent search for it and that he could not find it, and he said that it never had been in the recorder's office—he never had had it recorded. It was 196 not right after this trouble with the Doctor that I began to assert my connection with this claim and that I was the owner of a half interest in the claim, and Eadie a half interest. I had asserted it all the time. I told it previously, sometime the latter part of July. When I received this letter from Chambers saying that he was coming up to Nome, when he had told me in Seattle that he would not come up here, or not make any claim to any portion of this property, then I told my lawyer—I went to my lawyer and told him all about this deed, of course, told him the whole matter. I had told my lawyer earlier than that when Chambers began talking of coming to Nome, and when he began making statements that he would not agree to this and that in regard to these contracts, and was going to make trouble; then I told Mr. Fuller I did not tell any one else. After this trouble after Dr. Chambers arrived, I did not begin to tell everybody everything connected with the Bon Voyage claim. Anyone that asked me, I told them I owned a half interest. All the people that asked me anything about it. Since 1903, since I gave Mr. Eadie his deed, I have claimed that I owned, right along. I have claimed that I owned a half interest in the Bon Voyage claim until the fall of 1904; I claimed I owned the entire claim from the fall of 1903 to the fall of 1904, when I gave Eadie his deed to a half interest, or a contract for a half-interest, when I ceased to own the whole claim and Mr. Eadie owned a half. Every- one in Nome who knew anything about my connection with 197 this claim knew that I was claiming to own the entire claim until the time when I made the contract with Mr. Eadie to give him a half interest. On the day of the trouble on Steadman Avenue I came in from the claim; I had been out with my instrument surveying it and getting up the stakes, Mr. Eadie and I, going over the stakes and putting them up all around. I went out to the States that fall. I went out the next month some time in October. Shortly after my arrival in Seattle I met Mr. Rinehart. I met him right in the Scandinavian Bank of Seattle, on the 3d of November, 1906. After going out I met Mr. Rinehart and he asked me something in regard to the matter between Chambers and myself. I answer no to your question if in my conversation with Mr. Rinehart I did not state to Mr. Rinehart, in substance, that Dr. Chambers and I had in May, 1906, changed this deed, according to an arrangement between us expressing the interest that I meant to convey to the doctor in that claim, but that some trouble had arisen between me and the doctor wherein he had not done what he had specifically agreed to do, and that for that reason you had consulted a lawyer,

who had told you that the deed having been changed was invalid, and did not amount to anything, which he had not known before.

(Whereupon a paper is handed to the witness.)

The WITNESS (continuing): I made that affidavit that is my signature. I think I made that affidavit; I made an affidavit
198 in this case, and that is my signature there anyway, so I suppose that is my affidavit. On page four of the affidavit at the top of the page, I made that.

Mr. GILMORE (reading from the affidavit): "On the following morning affiant while waiting for the said Rhinehart, went into the office of the said Chambers and was at once informed by said Chambers that he, the said Chambers, was the owner of an undivided one-half interest in the said Bon Voyage Mining Claim, together with other property in the said Cape Nome Mining District; that just after this affiant had left on the previous night, the said Chambers had been looking through the said affiant's papers and had then found a conveyance from the said affiant to him the said Chambers, of an undivided one-half interest in said property," Now, will you please explain to the jury what you meant by this language, which I have just read to you from this affidavit?

The WITNESS (continuing): It is true that he stated to me that he had found this deed, but it is false that he had been looking through the affiant's papers; he had been looking through his papers; he told me he had been looking through his papers; that is what should have been written, through his papers; this was written up by Mr. Fuller's stenographer; I presume that is her mistake; what it should be is; that just after this affiant had left on the previous night, he the said Chambers had been looking through
199 Chambers' papers—through his papers—not my papers—that is where the mistake is, and has found a conveyance to an undivided one-half interest in said property. My correction is that there was the wrong use of the word "affiant."

Mr. GILMORE: Now, just take this affidavit, on the same page of Whittren's affidavit, about fifteen lines from the bottom, starting about the middle of the page, and reading down from there, I will call your attention to this portion. (Reads:) That affiant asked the said Chambers what had been done to the said instrument, and said Chambers replied that nothing had been done to it, and that it was just as he had found it. Affiant then called his attention to the discoloration and the said Chambers finally admitted that the said instrument had been changed by him but begged that nothing be said about it on account of the injurious effect it would have on his standing and that of his family. Affiant finally told said Chambers that he would not recognize any rights whatever under the said altered bill of sale, but that he would give him the said Chambers one-fourth of the proceeds of the said mining claim provided he never attempted to utter or publish the said altered bill of sale or interfere with the working or operation of the said mining claim or any sale that affiant might desire to make thereof, and that if he did not comply with these conditions, he was to have nothing

whatever from the said claim." Now, is that portion of this affidavit, in this statement that I have just read "that he would
200 give him the said Chambers, one-fourth of the proceeds of the said mining claim." Is that statement in that affidavit true or false?

The WITNESS (continuing): It should have been his wife. Mr. Fuller drew this affidavit up, that should have been to Chamber's wife. Mr. Fuller made this mistake. Mr. Fuller advised me to turn this matter over to Chambers rather than have a lawsuit about it. It is true all but that it should have been his wife there instead of to Chambers. It should have been to his wife instead of to him.

Mr. GILMORE: Now, take this same affidavit on the next page and ending on the last page, page 6, and state whether or not this statement therein contained is true or whether it is false. (Reads:) "That when said Chambers came to Nome in September, 1906, affiant offered to pay and to account to him for a one-fourth part of the proceeds of the said claim, that is, one-half of the amount received by affiant on condition that the said Chambers would not interfere with the said leases, but would accept the arrangement made in Seattle in May, 1906." Is that true that you offered to account to him?

The WITNESS (continuing): That is true I offered to account to him. I did say something to him about giving him half of the proceeds received by me from this Bon Voyage Claim. After consulting with my attorney, Mr. Fuller, it was agreed that I would turn over the proceeds to him rather than to have a lawsuit. Mr.

201 Fuller was negotiating with them about it. I signed this affidavit of course, but Mr. Fuller was supposed to make it out for me from what I told him. I read it over before I signed it.

Mr. GILMORE: I now offer the original affidavit in evidence.

Mr. FINK: No objection.

Whereupon the said affidavit was marked "Plaintiff's Exhibit No. 12," was read in evidence to the jury, and was in the words and figures following, to wit:

PLAINTIFF'S EXHIBIT NO. 12.

In the U. S. District Court, District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, et al., Defendants.

Affidavit of Defendant J. Potter Whittren.

J. Potter Whittren, being first duly sworn, on oath deposes and says, that he has read the affidavit of the plaintiff filed herein on October 13, 1906, and denies that affiant ever changed the instrument mentioned in the said affidavit by the said Chambers, and de-

nies that affiant has ever recognized any interest of the said Chambers except as hereinafter stated. Affiant admits that he wrote the letters, copies of parts of which are set forth in the said affidavit of the plaintiff herein, and alleges that during the period covered

202 ered by said letters, he also wrote other letter setting forth that the said Chambers was to have a one-fourth part of the proceeds of the said mining claims under certain conditions and not otherwise, which said letters are not referred to in the said affidavit of Chambers, that during the years 1900, 1901, and 1902, the plaintiff and affiant were interested in certain mining claims in the Cape Nome and Port Clarence Mining Districts, and that the plaintiff left Nome in the fall of 1902, and left the District of Alaska, and did not return until September, 1906, during all of which time the said Chambers contributed only the sum of \$100 towards the expenses and sums of money required to perform the assessment work upon the said mining claims; that in May 1903, affiant called upon the said Chambers in Seattle in regard to the payment of his proportion of the expenses of representing the various mining claims owned together by them during the previous years, and also for the purpose of making arrangements for keeping up the assessment work for the year 1903; that affiant then asked the said Chambers to look through his papers and see just what properties they owned together and what property he desired to have the assessment work performed upon. Said Chambers stated at the time that he wished to retain his quarter interest in three different claims in the Bluestone district, and also his $1/4$ interest in No. 5 $1/2$ Below on Little

203 Creek, and that he thought best to let two other wildeats in the Nome District, one of which was the Bon Voyage Mining Claim, go without representation for that year. That the said Chambers then found and produced a conveyance from himself from this affiant of a one-fourth interest in the mining claims in the Bluestone District, but stated that he found no conveyance of any kind in regard to any mining claims in the Cape Nome District and that he was sure that no conveyance had ever been made by affiant to him. That affiant then agreed to have annual labor performed upon three mining claims in the Bluestone district and on the said No. 5 $1/2$ Below on Little Creek, in the Cape Nome District, and agreed to give to the said Chambers a conveyance for a $1/4$ interest in the said No. 5 $1/2$ Below on Little Creek any time that he should make demand therefor; and that the said Chambers then paid the affiant the sum of \$100.00, for his share of the assessment work to be performed upon the four claims just mentioned; and that this affiant had such work performed during the summer of 1903; and that since the said time the said Chambers has in no way contributed towards the performance of the assessment work on any of the claims above mentioned; and that the whole of the burden of such assessment work has been borne by affiant, as none of the said claims has been productive, except for the amount produced by the Bon Voyage Mining Claim during the past few weeks.

That in the year 1904, affiant agreed to convey to the defendant

204 Eadie a one-half interest in the said Bon Voyage Mining Claim in consideration of the performance thereon by the said Eadie during the said year of One Hundred Dollars worth of work, and that affiant had no labor performed upon the claim No. 5½ Below on Little Creek, as he did not consider it worth doing the labor thereon; and that when he arrived in Seattle in the year 1904, he informed the said Chambers what he had done in regard to the said claim on Little Creek, and the said Chambers expressed himself as well satisfied, as he thought it of no use to expend further money on claims not known to be of any value.

That in May, 1906, affiant, while in Seattle, was informed that a telegram had been received by one W. V. Rinehart, Jr., stating that some pay had been discovered on a claim owned by affiant near Nome, by Eugene Chilberg, who had been working under a lease from another party and asking for a lease on the said claim; that affiant happened to meet the said Chambers about the said time, and informed him in regard to the said telegram and stated that he thought he referred to the Bon Voyage Mining Claim, and that he, the said Chambers, would have done well to hold on to an interest in the said claim; and that the said Chambers then stated that he thought that in view of his past relationship as partner of the affiant, affiant should give him a show in the said claim at any rate, but did not claim that he was entitled as a matter of right to any interest in the said mining claim. On the following morning,

205 affiant, while waiting for the said Rinehart, went into the office of the said Chambers, and was at once informed by said Chambers that he, the said Chambers, was the owner of an undivided one-half interest in the said Bon Voyage Mining Claim, together with other property in the said Cape Nome District; that just after this affiant had left on the previous night, he the said Chambers, had been looking through affiant's papers and had then found a conveyance from the said affiant to him, said Chambers, of an undivided one-half interest in said property. Said Chambers then went to a writing cabinet in his said office and took therefrom a bill of sale and handed it to affiant, which paper affiant at once noticed had been altered by means of chemicals in the part expressing the interest conveyed in the property therein described. That affiant asked the said Chambers what had been done to the said instrument, and said Chambers replied that nothing had been done to it, and that it was just as he had found it. Affiant then called his attention to the discoloration, and the said Chambers finally admitted that the said instrument had been changed by him, but begged that nothing be said about it, on account of the injurious effect it would have on his standing and that of his family. Affiant finally told said Chambers that he would not recognize any rights whatever under the said altered bill of sale, but that he would give him, the said Chambers, one-fourth of the proceeds of the said mining claim provided he never attempted to utter or publish the said altered bill of sale or interfere with the working or operation of the said
206 mining claim or any sale that affiant might desire to make thereof, and that if he did not comply with these conditions

he was to have nothing whatever from the said claim. Said Chambers then asked for a memorandum in writing, stating these conditions, which affiant refused, thinking it was not safe to trust a person with his signature who was in the habit of making alterations of the kind he had just made. Said Chambers then stated that he would give affiant some writing showing their interests in the said claim, to which affiant replied that he might make out any writing that he chose, but that affiant would not recognize the same, and the said Chambers then did, on his office letter-head, execute a writing, setting forth that the said Chambers and affiant were equally interested in the said Bon Voyage Mining Claim—that is, that each one was the owner of a one-half interest in an undivided one-half part thereof; which writing this affiant now has in his possession.

That the telegram above mentioned from the said Chilberg asked for a lease of the said mining claim paying therefor 25% royalty, and that the said Chambers expressed himself as well satisfied with such rate of royalty, but after affiant's return to Nome in June, 1906, he found that other parties were claiming the said mining claim or parts of it, and also that some of the partners of the said Chilberg were unsatisfactory to the said Eadie and that the said

Eadie was unwilling to lease the said mining claim to them.
207 That thereupon the said Eadie and affiant leased a one-third part of the said claim to the defendant Frank H. Waskey, for a royalty of 35%.

That a few days after this an attempted re-location of the said claim was made to W. J. Rogers, and affiant concluded it to be necessary to have some one in actual possession and occupation of said mining claim, and working the same, as he had discovered that the part leased to the said Waskey was not covered by the conflicting locations. That thereupon on the 20th day of June, 1906, he made the arrangement mentioned by the plaintiff for working of the said claim by the said Eadie and the said Waskey at the rate of 25% royalty, and that the said rate was the best royalty that he was able to obtain at that time; that the same was and is a fair rate considering the state of the title to the said part of the claim, and that no pay had been located on the said part; that affiant at one time told said Waskey that he had a silent partner who was to have part of the proceeds of said claim, but that said Waskey was not informed as to the name of such partner.

That affiant kept the said Chambers fully informed of all that he had done and proposed to do in the premises, as he had told him that he would do; but in August, 1906, the said Chambers wrote to the said Waskey, stating that he was the owner of a one-half interest in the said claim, and that he did not recognize the leases given thereon by affiant and the said Eadie. That when the said

Chambers came to Nome, in September, 1906, affiant offered
208 to pay and to account to him for a one-fourth part of the proceeds of the said claim—that is, one-half of the amount received by affiant, on condition that the said Chambers would not interfere with the said leases, but would accept the arrangement made in Seattle in May, 1906. The said Chambers refused to abide

by the said arrangement, and claimed that he was entitled to one-half of the said mining claim, which said demands affiant was unable to comply with, and the right and justice of which he wholly denies.

J. POTTER WHITTREN.

Subscribed and sworn to before me this 15th day of October, 1906.

[NOTARIAL SEAL.]

F. R. COWDEN,
Notary Public, Alaska.

The WITNESS (continuing): On yesterday I stated that the trouble arose between me and Dr. Chambers over this changed deed on the 24th of May last year. That is the right date. We consulted this same day, Dr. Chambers and I, with reference to this telegram with reference to the Bon Voyage. The telegram that Rinehart showed me was in code. I went back to Dr. Chambers' office with the telegram, and showed him the telegram, after we had looked it up the ten words and re-wrote a telegram in code. I called at Dr. Chambers' office in the Alaska Building, in Seattle, on the 24th day of May, with reference to the framing of a telegram which we would send to Mr. Chilberg in Nome. That was on the 25th, I
209 think. I never visited Dr. Chambers again after the 25th with reference to consulting him with reference to the Bon Voyage claim. I cannot recollect of any other time. To the best of my recollection I never visited Dr. Chambers' office myself or with others after the 25th of May, 1906, prior to my departure for Nome in June. I left Seattle for Nome the 1st of June. To the best of my memory between the 25th of May, 1906, and the 1st of June, a period of about six days, I don't recollect of having visited Dr. Chambers' office to consult him with reference to the Bon Voyage claim. It is not a fact that the Chilberg message which was sent and signed by me was prepared by Dr. Chambers in his office, and was in his handwriting and was handed to Mr. Rinehart to send. That is not true. It was intended that I should sign the telegram. It was not intended that Mr. Rinehart should send it instead of me. It was intended for me to sign it. The telegram was in Dr. Chambers' handwriting. I at first dictated, put it in code, sat down and wrote it out in code, and Chambers came along and said that he could put it in ten words without putting it in code, and that was satisfactory to me all right, so he just wrote out the telegram, intending for me to sign it. It was not a fact that after the telegram was framed it was intended that Rinehart should sign it, and that it should afterwards be taken to the telegraph office and sent by me. It was not afterwards changed that I was to sign it instead of Mr.
210 Rinehart; there was no change made except what I have told you, about putting it into ten words without putting it in code. The telegram was written out and I said when I read it that that was satisfactory to me, and then I signed it and it was sent. The only change that there was was that it was in Doc's handwriting; Rinehart wanted to make some change in it from the code, I believe, but if I recollect after the changes were made, I said

that it was satisfactory to me then as it was, and I sat down and signed it and afterwards it was sent to the telegraph office and sent, so far as I know, as it was prepared and agreed to. I have a copy of it here.

(Witness produces paper.)

MR. GILMORE: (Producing paper.) Look over this document and state whether or not that is the original telegram written by Dr. Chambers, in Dr. Chambers' handwriting.

The WITNESS (continuing): It is now put in Dr. Chambers' handwriting. Chambers wrote these lines, "Lease one year satisfactory to Whittren; consult Eadie, partner, Nome," and I signed it; my signature there is in my own handwriting. It was not arranged between me and Dr. Chambers and Mr. Rinehart, that Rinehart should send this telegram so that I would not have to make any explanation and be put to that expense to show that the property had been transferred to me. That is not why the telegram was made out at that time in that way. I don't know whether that telegram was sent that way or whether "Whittren" was scratched out—I don't know whose name was put in there if mine was not—at the
 211 time anyway. I do not know who scratched it out. It was agreed that I was to sign the telegram from the first. Dr. Chambers did not scratch my name out there in my presence anyway. I did not write the word "y o r k" that is in there. That is not my handwriting. I don't know if that word "york" was in there at the time when the rest of this telegram was written by Dr. Chambers. I don't know in whose handwriting the date of May 26th, 1906, is. The original telegram, I think, was dated May 25th; this may have been put in afterward by Rinehart; I don't know if that is his handwriting or not, I mean the one received here. I think that in the original telegram the date was the 25th of May, myself. The message as it was originally prepared says: "Lease one year satisfactory to Whittren; consult Eadie, partner, Nome." I did not understand that it was intended to be signed by Rinehart. I know the telegram was originally written "Lease one year satisfactory to Whittren. Consult Eadie Partner, Nome." That was the message as it was originally intended to be sent and I was to sign it. I will testify positively that it was intended that I should sign the telegram and not Rinehart, as it was originally got up, and delivered. If the original telegram shows in fact the words "Lease one year satisfactory Whittren; consult Eadie, partner, Nome," and the date was written in afterwards, some one else wrote the date. Mr.
 212 Rinehart wrote this word "Andrew" in there. Mr. Rinehart asked who this Eadie was, and so I called him Andrew Eadie to him; I had called him Eadie, you know, up to that time; he wanted to know what Eady he was—I had always called him Eadie. Rinehart wrote it in the original telegram. The word "Whittren" was not scratched out of the original when I was in the room; it was not done while I was there, as I remember of now. The telegram being signed by me had nothing to do with my name

being scratched out and was not signed by me for that purpose. It was originally intended for me to sign the telegram.

Mr. GILMORE: We offer in evidence the original telegram for the purpose of showing that on the following day, after the time when the witness says they had the break, or the second day after, at any rate, that they met in Dr. Chambers' office in the Alaska Building in Seattle, and there had a consultation with reference to the Bon Voyage property, and that this telegram was prepared, this telegram showing that no row had taken place as this witness had claimed, that the inference is that if such a row had taken place this witness would not have been there in consultation with the plaintiff, and in fact having the doctor prepare and write the telegram with reference to this property. We offer the original telegram in evidence for the purposes stated.

Mr. COCHRAN: No objections.

Whereupon the paper referred to was marked "Plaintiff's Exhibit No. 13," was read in evidence to the jury and was in the
213 words and figures following, to wit:

PLAINTIFF'S EXHIBIT No. 13.

Copy of Telegram, Whittren to Chilberg.

Dr. J. J. Chambers, 601, 603 Alaska Building.

MAY 26, 1906.

Lease one year satisfactory [to Whittren]* Consult ^{Andrew} A Eadie,
York partner, A Nome.

J. POTTER WHITTREN.

The WITNESS (continuing): That telegram has been changed to include the word "York." I signed the telegram and the date is in Rinehart's handwriting. That telegram was received in Nome on the 28th day of May, as I understood. Within two days after this telegram was sent Andrew Eadie showed up in Seattle. He had been out in the States all winter. I met him in Seattle on the street there the latter part of May, 1906. I was surprised to meet Andrew Eadie in Seattle thinking he was still in Alaska. I did not take Andrew Eadie up to Dr. Chambers' office the first thing after I met him. I think it was the next day that I took him up and introduced him to Dr. Chambers. I won't swear that I introduced Andrew Eadie to Chambers; I won't be positive about that; to the best of my recollection Andrew Eadie and I were walking along on
214 Second Avenue, and we met Dr. Chambers coming out of a barber-shop right across and in front of the Bailey Building, directly across the street from his office, and to the best of my recollection I introduced them right in front of the Alaska

[* Words enclosed in brackets erased in copy.]

Building. Chambers came across the street and I introduced them right in front of the Alaska Building; that is my recollection now. I introduced him as my partner in the Bon Voyage claim from Nome. I did not turn around to Mr. Eadie and say also to him, "This is your partner, Mr. Eadie, that you have not met before." That would be silly because Andrew Eadie knew I had no partner besides himself. I did not say to Dr. Chambers when I introduced Mr. Eadie to him, "Here is Mr. Eadie, your partner, that we thought was in Nome, that we sent the telegram to." Those words were not used in the introduction in the way you use them now. Those words with reference to Mr. Eadie being my partner in Nome, that we thought was in Nome at the time we sent the telegram, that was said all right enough, but not Dr. Chambers' partner, by any manner of means, that is foolishness. I did introduce Mr. Eadie to Dr. Chambers, after telling him that it was my partner from Nome, in the manner you said, that we thought he was in Nome when we sent the telegram, but never in the manner you said it, in his office, or on the street or anywhere else. It is not a fact that right in Dr. Chambers' office in the Alaska Building in Seattle I introduced Mr. Eadie to him as "Here is Mr. Eadie, your partner, from Nome, in the Bon Voyage claim, whom we thought was in Nome." I
215 went out and left them in the office, Mr. Eadie and Dr. Chambers, together. My best recollection now is that the introduction took place down on the street in front of the Alaska Building. I don't think I am mistaken, but I won't swear that it did not take place after I took Mr. Eadie up to Dr. Chambers' office, because I don't recollect positively now. I remember once I saw Chambers coming out of the barber-shop across the street and met him in front of his offices, but I could not swear positively whether that was the time when Mr. Eadie was with me or not. I am pretty sure I could not be mistaken in the words used in the introduction. I am pretty sure of that, all right; I am not mistaken about that because the way you put it it is foolishness, because I never have recognized Chambers as a partner of mine since he told me in 1903 that he had let the wildcats go. As to where the introduction took place, it is my recollection now that I looked up and saw Chambers coming out of the barber-shop just across the street and he was coming towards us, and the way my recollection is now, that I introduced Mr. Eadie to him right there on the street; I don't know whether we stood there talking on the first floor or whether we stood right in the door as Chambers was on his way up to his office then. I think we both went with Dr. Chambers up to his office. I am not sure whether I went on up to, or whether Mr. Eadie went up alone with the doctor; I won't swear positively now. I was very
much surprised to meet Mr. Eadie in Seattle. We didn't go
216 to any expense in wiring to Chilberg; I didn't, anyway. I don't know how many days it was after the telegram was sent; I think it was a couple of days; I have not paid very much attention to these dates. I don't know if it was the next day after the telegram was sent to Chilberg. I could not say the date. I don't remember whether it was one or two or three days after the telegram

was sent. It made me somewhat surprised to meet him in Seattle after wiring to Nome as we had. I am under the impression that it was the same day the *telegram sent*; that is my impression now. Of course I was surprised. I am under the impression that the telegram was sent on the 25th; that has been my understanding all along, that the message was sent the next day after I was in Chambers' office when he produced this bill of sale—it was very soon after that I know that much. If the telegram was sent on the 25th I don't know whether I met Mr. Eadie the day after or not; I know the telegram was delivered to Rinehart in the forenoon, and I was under the impression all along that it was sent on the 25th. When that telegram was prepared by Dr. Chambers we did not go into the question of whether or not we would give a lease on the property to the man who had struck the pay. We did not have a long discussion there in Chambers' office of giving a lease and that if you gave a lease at all that you would give it to the men who had struck the pay on the ground. It was not talked over between us

at great length before we wrote the telegram which was finally
 217 sent, and we had not prepared a telegram at that time covering fifty or seventy-five words. I should say I did not do that. I told him I could put all I wanted to say in ten words. I don't know what you would call it, what we did; he wrote what I dictated. I talked it over with him when he asked me that is about all. That telegram does not show that he had any interest in it. I did not consult him. I might have gone to Mr. Rinehart and had the telegram written out without consulting Dr. Chambers. I agreed to deliver the telegram to Mr. Rinehart, and in regard to consulting Chambers, I had agreed that I would keep him posted in regards to every move in regard to the property, and I was only keeping my word, in keeping him posted about what I had done in regard to the lease on the property and the telegram I had sent. I did not tell Mr. Rinehart that I had gone in to consult Mr. Chambers, about the kind of a telegram to be sent. I deny positively that I ever told Mr. Rinehart that I would go and see my partner before I would send a telegram to Mr. Chilberg; that was all threshed out while Mr. Rinehart was in the office, when the telegram was delivered and sent. It is a fact that before that when I first spoke to Mr. Rinehart about the telegram that I told him I would have to first go and see and talk with Dr. Chambers before giving my answer. I do not know of my own knowledge whether the doctor and Mr.

Eadie discussed the question of letting to these people men-
 218 tioned in the telegram. I do not know whether or not Dr. Chambers exhibited to Mr. Eadie this deed to a one-half interest in the Bon Voyage mining claim. I was not present in his office. Mr. Eadie did not come up on the same boat that I did. I do not know what boat he came on; I left ahead of him. I presume he left very shortly after I left Seattle.

Mr. Eadie did not tell Dr. Chambers and I, in Seattle, the three of us being present, that he was taking a boiler up to work the Bon Voyage under an arrangement that he had for a half interest. I testified that I wrote the original deed, yes, sir, and that I wrote in

the words one-quarter interest in the deed originally and the figures $\frac{1}{4}$ also. I replied to Mr. Cochran yesterday that there had been some change in the part of this deed that was discolored since the hearing on the injunction along in October. I testify positively that there has been some change of some kinds. There are some marks—if I can see the bill of sale—have the bill of sale. (Plaintiffs' Exhibit No. 1 produced.) Last fall during the argument for the injunction this was offered in evidence and Mr. Murane pointed out, by putting it under the glass, that there were marks there that you could distinguish, enough that were plain and visible yet and that you could by looking at it closely distinguish plainly what they were. I mean that a change has been made since the injunction; that was in October, when this case was started. Also there has been a change since yesterday in my opinion. In my opinion there is a change since yesterday. I could not say as to the possibility of there being a change in this instrument between now and tomorrow. I don't think it could be accounted for by the fact that the instrument has been handled here a great deal during the trial, not in so short a time. I could not try to indicate in the background what I was able to see in the discolored part, only I think where *th* this blotch is there is some different indications than what were on there last fall. I could not attempt to say that it was done by some party in the interest of Dr. Chambers. I don't say who or how it was done. I don't know if it is possible that it may have been done when the instrument was photographed. The interest written in there before does not stand out so plainly as it did before. It does not stand out nearly so plain, because by looking at it closely last fall you could plainly distinguish the figures and the words one-quarter. The discoloration on the deed is not the same underneath as it was. I do not think the outline of the discoloration is the same. I do not think you could see those black marks out from the edge of it; they did not extend so far back. But it was darker; you could see the discoloration clear across the room; it is not so strong. You could see the discoloration here across the room, I should say you could. I saw it there, it was dark. You cannot see it there now, not so far.

Whereupon the witness was excused.

220 Whereupon, Mr. F. E. FULLER was recalled, as a witness on behalf of the defendants, and having been duly sworn, testified as follows, to wit:

I hold the official position of Commissioner and Recorder in the Nome Mining and Recording District, and have been such since July 1st, 1906. I was the United States Commissioner and ex-officio Recorder for this precinct on July 20th, 1906. This is my certificate as recorder, to the instrument which you hand, marked Plaintiff's Exhibit No. 1. The first time I saw that instrument was some two or three weeks after it was recorded, about the middle of August, if I remember. I have no recollection of the instrument or its acknowledgment; I cannot remember of ever having seen it except that that is my signature and seal; I recognize those, but I

do not recognize the instrument nor do I remember the circumstances, I have no recollection of the quantum of interest conveyed by that deed at that time. I don't suppose I read the deed over at all. When the deed was in the Recorder's office last summer, it was discolored very much more than at present, where the words one-half and the figures $\frac{1}{2}$ are written in, very much more than it is now, and also there was some more writing underneath there, visible, some marks, but I could not distinguish what they were at all. They were plainly visible, and sufficiently visible at that time to show how the instrument had been altered in that part. The first time I saw

221 it was a matter of some two or three weeks after it was recorded. I saw it there in the office. I saw it upon the injunction proceedings in this court; that was the last time that I saw it until it was produced at this trial, about the middle of October of last year; that was the last time I have seen it until this trial. It was in practically the same condition then as it was when it was in my office for record. With reference to its condition now and when it was offered here at the injunctive proceeding, the discoloration does not show nearly so plainly, and traces of writing underneath have disappeared that were very plainly visible on it at that time. There had been writing underneath the words "one-half," and the figures " $\frac{1}{2}$ " in the conveying clause that were visible at that time. The marks of writing were plainly visible to the naked eye; very plainly visible where the numbers are, and there were some traces of writing right where the words are. They were very plain where the "1" is. There are none of those traces there now that were plainly visible then. You can't see them there now at all. I have examined the instrument with a magnifying glass.

Cross-examination.

(By Mr. MURANE:)

The WITNESS (continuing): I first saw this deed about three weeks after it was filed for record in my office. I would not be sure of the exact date. And I kept it in my office until the doctor came in in September some time. He came into my office and got it at that time. I did not deliver it to him the first time he
222 asked for it. I refused to deliver it to him the first time. I am not sure whether you were present or not. I remember of calling some one's attention to the alteration at the time and to the exact condition of the deed. I think you were present probably. I see traces of some marks there now. The marks I see look like traces of a pencil-mark. It looks as though there was a little mark below the line there (indicating), or had been.

Mr. MURANE: I will ask you to examine this word here and see if you cannot see and "h" and an "e" and then a space and then an "r." Just look at it closely and see if you can't discern those letters—that mark right here—then a little mark as if there had been a letter "t" there—do you see a mark running below the line there? Can't you discern any evidence of that there? Do you not see the evidence of a "t" "h" there.

The WITNESS (continuing): I can't see that there is. I cannot see anything of that kind there now.

Mr. MURANE:

Q. Now, Judge, will you testify positively that that instrument has been changed by any person putting any other marks there than what it might be possible was changed by force of nature since it was here upon the trial in the injunction matter?

A. I don't know how much forces of nature might change it.

Q. Well, will you testify that it has been changed by any person putting any marks upon it other than what were there in October last?

223 Answer: I say, I don't know how much forces of nature might change its appearance, and I don't know how such marks came there. I simply say now that it appears different now from what it did then; I am not attempting to explain how it was changed.

The WITNESS (continuing): It covered all of this part here (indicating), and it was much more noticeable. The discoloration was much more noticeable and there were some marks under this one figure where there was some writing noticeable. I cannot remember what the writing was. I could not make it out. I could tell there was a mark under there; it was perfectly visible. I examined this paper closely at the time of the injunction but — so closely as I had before. I do not see that this discoloration is now more pronounced under the line than it was when I examined it before; no more than it is above the line than I can see; I don't remember that it was then. I don't see that it is any more than there above the line, or not as much so. The discoloration varies some; over there in this other place under the line, it looks to me to be about the same. Under the first word, the lower portion of the first word, it looks as if there had been some marks there. I would not attempt to say what it is that appears under the last letter of the word "One"; it looks to be some mark there. There was never a time when I could see to say what that letter was, when I saw this instrument at any time before; never to know what letter it was; what letters they were; there never was a time; the instrument is about the same as it was at the injunction trial, with

224 the differences I have stated before. It was not so great a difference on account of the discoloration, but you could see those marks underneath the discoloration; they showed then to be plainly visible that there were some marks there; I would not undertake to say what they were at that time even. I cannot see anything there to say what it was. I have examined it pretty closely, and I cannot distinguish any letters underneath any part of the instrument now and never could.

And thereupon the witness was excused.

And thereupon Mr. O. D. COCHRAN was called as a witness for the defendants, and being duly sworn, testified as follows, to wit:

(Questions by Mr. FINK:)

The WITNESS: My name is O. D. Cochran; I am an attorney at law. I am one of the attorneys in this case. I might say I was hired at the time of the injunction. Referring to Plaintiff's Exhibit No. 1, which has been introduced in this case, and particularly to the words one-half and the figures $\frac{1}{2}$, last fall when the application for an injunction pendente lite was being heard in this court, I examined it very closely and carefully when it was offered in evidence at the hearing. Under the words "one-half" there were traces of writing plainly visible at that time. Under the words one-half there were traces of a writing there which are now completely obliterated and none to be found upon the face of the instrument at that time. Under the figures " $\frac{1}{2}$," I think within that surface there were traces,

225 but I don't think they were directly under the figures there now. I don't think they were so directly under the space they cover now, which the words "one-half" cover. There were plainly discernable marks of former writing which are now completely obliterated. I have not seen that instrument since that time until it was produced in court. I have examined the instrument closely during the trial, and examined it frequently during the hearing for injunction, but I never examined it before during the trial. There is not now on that instrument any traces whatsoever of any old former writing which has been obliterated by the use of chemicals, and I have examined it very carefully and closely; I have examined it carefully with the naked eye and with a strong glass, the strongest glass to be had, and the marks there, with the glass I can see some traces of, but no traces of any writing whatsoever, and there are none there at the present time that can be seen by the naked eye, nor under the glass, that I can see. Those traces were plainly discernable last fall and with the naked eye. It was contended by plaintiff's attorney, Mr. Murane, at that time that the old writing "three-quarters" was visible at that time and that it contained traces of it upon the instrument still at that time. I endeavored in open court here at that time to get these gentlemen, the plaintiffs, to permit us to take this instrument and have it photographed, and I further endeavored to have it marked in the case and kept in the custody of the clerk of the court. They did not consent to it. They insisted on withdrawing it, and it being 226 one of their private papers did withdraw it, that is, they withdrew it after that hearing. I have not seen it since until it was produced here in court.

Cross-examination.

(By Mr. GILMORE:)

The WITNESS (continuing): Since the application for the injunction I have not seen this instrument until it was produced here at this trial. I will look at it again. Looking under your pointer, between the word "one" and "half," I cannot see a letter there; it is purely phantom; purely a ghost. There is nothing there for me or anyone else to see but an illusion. There is no trace of hand-

writing there; there are marks, I admit; but no written letters or words; there are traces of the action of the acids. I am Mr. Whittren's attorney, since two or three days ago. I have been Mr. Eadie's attorney since I was employed. I was employed and appeared for him in the injunction hearing: That was one time when I examined the instrument. That was the first time that I ever saw it. At that time with the naked eye I was able to see very plainly some visible marks, some evidences of marks. I could not decipher what they were. It was a mooted question what they were.

I could not tell from the instrument itself what they were; I have my own understanding of what they were, of course. It is impossible to tell, looking at it with the naked eye, only that the marks were in the discolored portion where it is now completely obliterated, but by holding the instrument up to the light where the light
227 reflected through it, that writing had been on there under this discolored portion was plainly discernable. I held

the instrument up to the light so that you could see ink marks upon it; so that it would appear upon the surface of the instrument; but you can see no traces of them now upon any portion of this portion; there are no traces of those marks left there now. It was impossible to tell what the former writing was, but by examining it closely, holding it up to the lamp you could plainly discern traces of a former writing, but, as I said, it was impossible to decipher it what the former writing was, from the instrument itself. I don't believe anybody in the courtroom has any better eyesight than I have, and I could not decipher what the writing was. I do not think it is possible that somebody wrote a word "t" there on the other side just enough so that you could see traces of a word written there, or have written an "h" and an "r" and two "ee's" on the other side of it so that traces of the writing would appear upon the right side. I remember traces of a former writing were quite plainly visible. It was visible to me and to others in the courtroom. I cannot see any word there in the part where I claim to have seen it before. I don't believe anybody else can without a great deal on his imagination. I know they can't. I am not susceptible to impressions; it is purely phantom. I do not think that Dr. Chambers was entitled to the custody of that instrument at the close of the injunction hearing, under the peculiar circumstances of the paper itself, or its peculiar condition. At the time I

228 insisted that it remain in the custody of the clerk of the court; neither party nor lawyers nor anyone else, was my protest, but the clerk of the court. You seem to have taken it from the custody of the clerk, according to your own statements. I know that the Court ruled that you were entitled to the custody of the instrument; that is the way the Court ruled, but as a matter of justice we thought we were entitled to have it preserved in exactly the same condition as it was when it was presented here, and we also asked permission to have it photographed in order to preserve a copy of it, at least; we didn't want the deed to keep; we only wanted to preserve it. I do not make any charges against anybody as having made a change in this document since then in

behalf of Dr. Chambers. I simply stated the facts that it has changed. All I know is that it has been changed since it was here on the injunction hearing, but what was the motive or who was guilty of it, I don't know. I argued my reasons for its change to the Court. I conceived that there was a very competent reason, and, as any lawyer would, I argued that reason to the Court, for the other side of the case.

Mr. GILMORE:

Question. If the word "three" had been written out, written out across the mark there where the word "one" is written out, do you not see where the end of the word, the double "e" would extend beyond the space where the word "one" now occupies, and does it not appear there now, if you hold the instrument up to the
229 light and examine it closely?

Answer. I see there is the wavy edge of the action of the acids; there is no letter or anything that shapes out like a letter. As a lawyer in this case I say that his Honor is the one who passes on the law—the Court states what the law in this case is; I don't think there is any misunderstanding on my part of that matter. You misunderstood the Court's ruling in the matter of admitting this instrument, Mr. Gilmore; even in the conveying declaration showed a change that the Court said it didn't show, it is upon us to show that it does show, and in assuming there to have been evidences of a former writing there underneath, upon this altered instrument that was apparent at a former time, and which we are endeavoring to show were there, but have disappeared. I could not say that there were marks there that I could not read, but which were evidence of former writing; I could not say what they were; I could not pretend to know what they were; I could not read them. There were some marks upon the face of this instrument here in an important part, the conveying clause, which I did not pretend to be able to decipher.

Whereupon the witness was excused.

230 And thereupon Mr. FRANK H. WASKEY, one of the defendants, was called as a witness on behalf of the defendants, and being duly sworn, testified as follows:

The WITNESS: My name is Frank H. Waskey. I am one of the parties defendant in this lawsuit. I am one of the lessees of the Bon Voyage Mining Claim.

Mr. FINK: We will offer a certified copy of the indenture of lease made and entered into on the 11th day of June, 1906, between Andrew Eadie and J. Potter Whittren, of Nome, Alaska, of a portion of the Bon Voyage mining claim.

Whereupon the said paper referred to was received in evidence, marked Defendants' Exhibit "G," the reading of the same to the jury at this time duly waived, and was in the words and figures following, to wit:

DEFENDANT'S EXHIBIT "G."

Lease, June 11, 1906, Eadie, Whittren and Waskey.

#36729

This indenture, made this 11th day of June, in the year nineteen hundred and six, between Andrew Eadie and J. Potter Whittren, both of Nome, Alaska, lessors, and F. H. Waskey, of the same place, lessee, witnesseth:

That the said lessors for and in consideration of the rents, royalties, covenants and agreements hereinafter reserved and contained and by the said lessee to be paid, kept and performed, do hereby lease, demise and let unto the said lessee all the following-described lands and premises, situate in Cape Nome mining and recording district, District of Alaska, to wit: Commencing at the southwest corner stake of the Bon Voyage Placer Mining Claim; thence northerly along the westerly boundary line of said mining claim 1320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1320 feet to the southerly boundary line of said mining claim; thence westerly 220 feet to the point and place of beginning; being a part of the said Bon Voyage Placer Mining Claim, the location notice whereof is of record in the office of the recorder of said Cape Nome recording district, in Book 99, at page 296, of the records of the said district.

To have and to hold all and singular the said demised premises, together with the appurtenances, unto the said lessee for the term commencing on the date hereof and expiring at noon on the first day of June, nineteen hundred and eight, unless sooner forfeited or determined through the violation by the said lessee of any covenant or agreement hereinafter contained and by him to be kept and performed.

And in consideration of such demise and lease the said lessee does covenant and agree with the said lessors as follows, to wit:

232 1. To enter upon the said premises within five days from the date hereof and thereafter to prospect, work and mine the same in good and miner-like manner, so as to take out the greatest possible amount of gold and gold-dust therefrom with due regard to the continued future working of the said mining claim and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously during the term of this lease; cessation of labor for a period of ten days to be deemed a violation of this agreement.

2. To properly timber all shafts and to keep all shafts, tunnels, drifts and stopes clear and in good and safe condition.

3. To allow the said lessors and their agent or agents at all times to enter upon and into all parts of the said premises for purposes of inspection and to be present and to assist at all cleanups, the restoring of the amalgam, and the weighing of the retort.

4. To give to the said lessors, at Nome, Alaska, at least ten hours' notice of each and every cleanup, and to make no cleanup without giving such notice.

5. To make and file for record an affidavit of the performance of the required annual labor upon the said mining claim during each calendar year of the term of this lease.

6. To pay to the said lessors, as royalty, thirty-five per centum (35%) of all gold, gold-dust and other precious minerals and metals mined or extracted from the said premises during the term
233 of this lease and to pay and deliver to the said lessors such royalty out of, and immediately after, each and every cleanup.

7. To allow no person or persons not in privity with the said parties hereto to take or hold possession of the said premises, or any part thereof under any pretense whatever, during the said term.

8. Not to assign this lease, or any interest therein, and not to sublet the said premises, or any part thereof, without the written consent of the said lessors.

9. To quit and deliver up to the said lessors the
F. E. F. possession of the said premises, x———x in good order
N. P. and condition for continued future mining, without demand or further notice, on said first day of June, 1908, or at any time previous upon demand for forfeiture.

It is expressly agreed that upon the violation by the said lessee of any covenant or agreement herein contained this lease and the term hereof shall, at the option of the lessors, become forfeited and determined, and the said lessors may at once enter into the possession of the said premises and remove any and all persons found thereon.

Each and every part and covenant hereof shall extend to and be binding upon the heirs, executors, administrators and assigns of the said lessors, and at the option of the lessors, the executors, administrators and assign of the said lessee.

234 In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

Done in triplicate.

ANDREW EADIE.	[SEAL.]
J. POTTER WHITTREN.	[SEAL.]
F. H. WASKEY.	[SEAL.]

Signed, sealed and delivered in the presence of:

F. E. FULLER.
A. G. BLAKE.

DISTRICT OF ALASKA,
Cape Nome Precinct, ss:

This is to certify that on this 11th day of June, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known, and known to be the same persons described in and whose names are sub-

scribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

Witness my hand and notarial seal this 11th day of June A. D. 1906.

[NOTARIAL SEAL.]

F. E. FULLER,
Notary Public for Alaska.

Filed for record Aug. 22, 1906, 2:20 P. M.
Request of F. H. Waskey.

F. E. FULLER, *Recorder.*
F. R. COWDEN, *Deputy.*

(Vol. 164, page 133.)

235 UNITED STATES OF AMERICA,
District of Alaska, Precinct of Cape Nome, ss:

I, F. E. Fuller, United States Commissioner and Ex-Officio Recorder in and for the Precinct of Cape Nome, in the Second Judicial Division of the District of Alaska, do hereby, certify that the above and foregoing is a true, full and complete copy of Instrument numbered 36729, the same being lease from Andrew Eadie and J. Potter Whittren to F. H. Waskey, as the same appears of record in Volume 164, at page 133, thereof, of the records of my office.

Witness my hand and the seal of said office this 28th day of August, 1907.

[OFFICIAL SEAL.]

F. E. FULLER, *Recorder.*

The WITNESS (continuing): The first lease was to two hundred and twenty feet off the westerly side line of the Bon Voyage, to one-third of the claim.

Mr. FINK: We next offer in evidence a certified copy of an agreement and lease made on the 20th day of June, 1906, by and between Andrew Eadie and J. Potter Whittren, party of the first part, and Frank H. Waskey, party of the second part, to the easterly four hundred and forty feet of the Bon Voyage mining claim.

Whereupon the paper referred to is received in evidence, marked Defendants' Exhibit "H," the reading of the same to the jury at this time being duly waived, and is in the words and figures following, to wit:

236

DEFENDANT'S EXHIBIT "H."

Lease, June 20, 1906, Eadie, Whittren and Waskey.

36869.

Agreement.

This Agreement made this 20th day of June, in the year nineteen hundred and six, By and Between Andrew Eadie, J. Potter Whittren and F. H. Waskey, all of Nome, Alaska, witnesseth:

Whereas, the said Eadie and Whittren are the owners of the Bon Voyage Placer *Mingin* Claim, situate in the Cape Nome Mining District, Alaska, the location notice whereof is of record in the office of the Recorder of the Cape Nome Recording District, in book 99, at page 296, of the records of said District;

And Whereas, the said Eadie and Waskey desire to work and mine the easterly 440 feet of the said mining claim, being all of the said claim not heretofore leased by the said Eadie and Whittren to the said Waskey;

Now, Therefore, in consideration of the premises and of the sum of One (\$1.00) Dollar, by the said parties paid each to the other, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is agreed as follows:

237 The said Eadie and Waskey agree to enter upon the said premises within one days from the date hereof, and thereafter to prospect, work and mine the same in good and miner-like manner, so as to take out the greatest amount of gold and gold-dust therefrom, with due regard to the continued future working of the said premises and the preservation of the same as a workable mine, and so to prospect work and mine the said premises steadily and continuously for the full term of two (2) years from the date hereof, or until said premises shall have been thoroughly and completely mined and worked out; cessation of labor for a period of ten (10) days to be deemed a violation of this agreement;

To properly timber all shafts and keep all shafts, tunnels, drifts and stopes clear and in good and safe condition.

To allow the said Whittren or his agent at all times to enter upon and into all parts of the said premises for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort, and to give said Whittren, or his agent, due notice of each and every cleanup.

It is agreed that of all gold, gold-dust and other precious minerals or metals mined or extracted from the said premises by the said Eadie and Waskey, under this agreement, one-eighth ($\frac{1}{8}$) part shall be paid and delivered to said Whittren immediately after each and every cleanup, and one-eighth ($\frac{1}{8}$) part to the said Eadie, 238 and the remainder shall be retained by and equally divided between the said Waskey and Eadie, after paying from such remainder all costs and expenses of mining and operating under this agreement; *the expense of first locating pay, however, to be borne solely by said Waskey.*

In Witness Whereof, the said parties have hereunto set their hands and seals in triplicate, the day and year first above written.

J. POTTER WHITTREN. [SEAL.]
ANDREW EADIE. [SEAL.]
F. H. WASKEY. [SEAL.]

Signed, sealed and delivered in the presence of:

P. D. OVERFIELD.

DISTRICT OF ALASKA,

Cape Nome Precinct, ss:

This is to certify that on this 30th day of August, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified personally came Andrew Eadie, J. Potter Whittren, and F. H. Waskey, to me known, and known to be the same persons described in and whose names are subscribed to the within instrument and acknowledged that they executed the same freely and voluntarily.

239 Witness my hand and notarial seal this 30th day of August, A. D. 1906.

[NOTARIAL SEAL.]

F. E. FULLER,
Notary Public for Alaska.

Filed for record Aug. 30, 1906, 2:50 P. M.

Request of F. H. Waskey.

F. E. FULLER, *Recorder.*
F. R. COWDEN, *Deputy.*

Vol. 164, page 138.

UNITED STATES OF AMERICA,

District of Alaska, Precinct of Cape Nome, ss:

I, F. E. Fuller, United States Commissioner and Ex-Officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full and complete copy of Instrument numbered 36869, the same being Agreement between Andrew Eadie, J. Potter Whittren and F. H. Waskey, as the same appears of record in Volume 164 at page 138 thereof of the records of my office.

Witness my hand and the seal of the said office this 28th day of August, 1907.

[OFFICIAL SEAL.]

F. E. FULLER, *Recorder.*

The WITNESS (continuing): June 20th, 1906, is the correct date of the execution of that lease. The lease was given to me on the 20th day of June.

240 Mr. FINK:

Question. At the time of the execution of this lease, and prior thereto, that is, prior to the execution, on the 20th day of June, 1906, had you any knowledge whatsoever of any claim by the plaintiff Dr. Chambers, of any interest in the Bon Voyage claim, whatsoever?

Mr. MURANE: We make the objection to this question as wholly irrelevant and immaterial, and not tending to prove or disapprove any of the issues in this case, first for the reason that it appears from the answers interposed by the defendants that they are not in a position to claim any benefit of the statutes of Alaska in regard to bona fide purchasers; for the further reason that it is not sufficiently pleaded in their answers, sufficient facts to entitle them to prove

that *t* they are bona fide purchasers without notice at all; further that they are not purchasers within the meaning of the statute.

And thereupon, in open court, it was conceded between the parties hereto that the deed to one-half interest in and to the Bon Voyage claim held by Dr. Chambers was recorded on the 20th day of June, 1906, the date of the deed being April 21, 1902; that the first lease to Waskey is dated June 11th, 1906; and the second one June 20th, 1906; the first lease was recorded August 20th, and the second lease was recorded August 30th, 1906.

The COURT: We sustain the objection to this question on the first ground; we sustain the objections also upon the second ground; as to the third ground we do not think it necessary to pass
241 upon that question.

Mr. FINK: I want to make an offer to prove in order to preserve the record, if the Court please.

The COURT: You may do that.

Mr. FINK: We offer to prove by the witness Frank H. Waskey that he executed the lease (Exhibit "G")—the lease and contract June 20th, 1906, and also the lease and contract Exhibit "H" on the 20th day of June, 1906, certified copies of which have been introduced in evidence and which are pleaded in the answer in good faith, without any notice or knowledge whatsoever as to any claim of the plaintiff Chambers to the premises or any portion thereof, or any interest therein whatsoever; that he executed said leases and contracts for a value consideration, and immediately after the execution thereof entered into the actual occupancy and possession of the mine under and by virtue of the leases and contracts referred to.

In connection with the offer, I desire to state the purposes of the offer.

This proof is offered for the purpose of showing that the defendant is an innocent purchaser, and that forthwith after the delivery of the said leases and contracts proceeded by the expenditure of large sums of money, to wit: several thousands of dollars to develop and prospect said mining claim and to open the same up as a workable mine, all of which said expenditures were made in perfect
242 good faith under the leases and contracts aforesaid and prior to the time that said Waskey had any knowledge or notice whatsoever of the claim of Dr. Chambers, and that said expenditures would not have been made nor said leases would have not *have* been entered into nor said development work have been done or the money expended as hereinbefore stated by Mr. Waskey, had the said Waskey had any notice or knowledge whatsoever of the claims of the plaintiff, Dr. Chambers.

Mr. MURANE: To all of which offer the plaintiff objects with the exception that we are willing for him to show, if he has the testimony to show it, that Mr. Waskey entered into possession under the leases in controversy or in question, of the property in controversy; we are willing also for him to show, if he can show it by proper testimony, that he expended money upon this property after entering into the leases. That is not a part of our objection to that portion of the offer; we think perhaps they would be entitled to show that. To that portion of the offer, however, which goes to the question of

notice, and the bona fides of the transaction we do object to on the ground that it is immaterial.

We desire to enter the objection of the offer of testimony made by the defendants on the ground that it is wholly irrelevant and immaterial; and does not prove or tend to prove *or tend to prove* any of the issues in this case; that it already has been ruled upon by the Court, except that portion of the offer which refers to the defendant

243 Waskey having entered into the leases introduced in evidence and having under said leases expended money in developing said mine; those two items of the offer we do not object to the testimony of.

The COURT: We sustain the objection to the offer according to its terms.

To which ruling of the Court the defendants and each of them then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I entered under the leases into the possession of the portions, respectively of the Bon Voyage claim mentioned in the leases themselves. I expended money in opening up and developing the mine.

Mr. FINK:

Question. Was that prior to any knowledge you had of Dr. Chambers' claim?

Mr. MURANE: That is objected to as wholly immaterial and irrelevant and having been already ruled upon the offer made, by the Court.

The COURT: Objection sustained.

To which ruling of the Court the defendants and each of them then and there excepted, which exceptions were allowed by the Court.

Mr. FINK:

Question. How much money did you expend in good faith under and by virtue of the leases and contracts introduced in evidence here—that is, how much money did you expend, in good faith, under the leases and contracts that you entered into possession under on the Bon Voyage, prior to the time that you had any notice or knowledge whatsoever of the claim of Dr. Chambers?

244 Mr. MURANE: That is objected to upon the grounds that it has been heretofore ruled upon by the Court; that it is wholly irrelevant and immaterial, and is the same question which was passed upon in the offer made by the defendants.

The COURT: Objection sustained. It is only a change in the way the question is put, but is virtually the same question.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Mr. FINK: I think that is all I care to ask the witness, but, with

the permission of the Court, Mr. Orton will take up another line of the examination.

The WITNESS (continuing): I think it was on the 14th of June, 1906, that I went into possession of that portion of the Bon Voyage claim referred to in the first lease set forth in my answer. I continued to work the mine and operate on this claim up to the time the injunction was issued against me last fall. I spent money in so doing. I commenced drift mining in the fall of 1898, in Southern Alaska, and I have done drift mining, either personally myself or under my supervision ever since, every year since 1898. I know some things about drift mining. I have operated mines on as large a scale as are usually operated in this country, or Alaska. I helped to operate the Snowflake; that is a good-sized drift mine. I did, to the best of my judgment, conduct the operations on the easterly portion of the Bon Voyage mine, being the operations under the first lease, in a workmanlike, and economical manner. To
245 the best of my judgment, they were conducted in a careful, workman-like and economical manner. I think, as I recollect it, nearly all of the gold that has come from the westerly portion has not yet been sluiced up; there is a large dump extracted from the easterly portion which has never been sluiced up. There is a large dump extracted from the easterly portion that has not been sluiced up. I kept a bookkeeper. I had set down in my books the amount of gold which I took out, the total amount. I should say it was set down correctly. Eddie Breen was my bookkeeper. I believe the books are in the vault, or are in a safe down at the bank; all of my books were placed there for safekeeping when I went out and I am told that these books are there yet; I think the books are all here in the vault. I told Mr. Breen that he had better lock them up last fall, and I haven't seen them any more since then. I don't see Mr. Breen here in court this morning, but I could telephone out and get them here in a very short time by sending a team for them. These books contain the amounts of my receipts and expenditures in the operating of these leases. By a reference to my books I believe I could tell the result of my operations on the westerly portion of this ground in conjunction with Mr. Eadie, the total operations of myself and Mr. Eadie, and the results of my operations alone on the easterly portion. I commenced mining on the Bon Voyage, I think it was on the 14th of June, on the westerly shaft
246 as I remember, 1906. I began by sinking a hole to bedrock trying to search for the pay. I commenced on the easterly shaft on the 20th of June, I believe, and proceeded there in the same manner. Approximately about seventy-five thousand dollars has been sluiced up altogether. The books state the amount of the expenditures correctly, as I remember they were approximately about fourteen or fifteen thousand on the westerly shaft, and as I remember it there was something about eighteen thousand—that is purely a matter from memory; I have not seen the books recently; a matter of eighteen thousand from the easterly shaft. Mr. Breen will be able to give us the exact figures from the books, it was somewhere around eighteen thousand dollars. I worked out

there myself superintending operations last summer and last fall. To the best of my recollection I have never received any wages or salary or anything of that sort; I am quite sure that I didn't. Mr. Joe Crabtree had charge of the work on that portion of the mine during my absence on the outside last winter. I don't know as a matter of fact whether Mr. Joe Crabtree received any wages that are entered on this book. These expenditures, such as I have stated and as are set forth in these books, were necessary and in my opinion very reasonable. I think I mined this ground in a careful and economical way. Either Mr. Crabtree or myself. During all this time either Mr. Crabtree or myself superintended the operation of this mine. I don't know how much the supervision of the mine

by Mr. Joe Crabtree and myself would be worth; I have
 247 never worked for wages in this country; I have hired a number of others, and I have always considered I was worth the same personally. I have hired men to supervise the operations of mines of considerable size, and know somewhat what the value of such services are reasonably worth. A competent man such as we like to have in the operation of a mine such as the mine in question, to attend to the mine and business affairs and matters along that line, besides all these other little difficulties that arise in this country, I should think would be worth at least fifteen dollars a day; I don't know of any man that could be hired for that amount, any competent man that there is in the country to be hired for that amount, or wasn't at that time, not such a person as one would naturally hire to look after the detail work in this country of a mine of that character. There are only a few of them in the country. In referring to little matters that may arise, I do not refer to litigation, but I find that there are many matters that require considerable looking after, and these are the matters I refer to. I refer to the active management of the mine and looking after the operation and interests. Mr. Crabtree was a competent man. I have reason to believe that his wages were entered in the books; I believe they were. I do not know whether they were paid.

Mr. ORTON:

Question. After commencing to mine, were any adverse claims made on this part of the ground by any third party?

248 Mr. MURANE: That is objected as as wholly immaterial and irrelevant and not proper to go into in this case; any adverse claims made by any third party are certainly not binding upon Dr. Chambers aside from claims made by him.

Mr. ORTON: We want to show that he has been charged in these expenditures defending the title and possession of this ground by adverse claims made by Otto Halla and others.

Mr. MURANE: What he has spent in defending his own title and Mr. Eadie's title, or anything of that kind certainly would not be a proper subject of inquiry in this case. We are willing to allow all reasonable expenses, but we don't want to go into the question of adverse title in this case.

The COURT: All that can be charged as the usual and ordinary expenditures. Objection sustained.

To which reuling of the Court, the defendants and each of them then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I think the original leases are in the safety deposit vault. I can go *down* and get them in a few minutes, if I can leave the witness-stand.

Mr. ORTON: We offer to prove that after Mr. Waskey obtained the leases set forth in the pleadings and entered into the possession and began to mine this ground that two separate suits were brought against him by third parties claiming portions of this
249 ground, and particularly that portion of the ground where the pay was, being a suit under a subsequent location; that those suits are still pending undetermined; that the parties bringing these suits claim a title adverse to Dr. Chambers, as well as adverse to Mr. Waskey, and the parties from whom he got his leases; that he had reasonably expended large sums of money in those cases, in excess of five thousand dollars and has incurred other expenses for which he has become liable and are not yet paid in excess of five thousand dollars; that such expenditures were necessary, reasonable and proper for the purpose of defending and protecting his title and possession of the premises as against these third parties, and in no way connected with Dr. Chambers, and antagonistic to him.

Mr. MURANE: We object to the offer upon the grounds heretofore set forth, in the grounds of my objection to this class of testimony.

The COURT: We sustain the objection.

To which ruling of the Court the defendants then and there excepted, which exceptions were allowed by the Court.

Mr. COCHRAN: On behalf of the defendant Eadie, in addition to the offer to prove already stated by Mr. Orton, I desire to state the following:

I offer to prove by the witness now upon the stand, the defendant Waskey, that large expenditures were made in conformity with the offer just made by Mr. Orton, and that in defending the title to
250 the Bon Voyage claim as against the claims of third parties, that such expenditures were made in accordance with an agreement made at the time of the execution of the leases under which the defendant Waskey holds, which is a condition given in the lease; in other words, we offer to prove by the witness upon the stand that as a condition to the execution of the leases under which he holds, he agreed to defend and pay part of the expenses of defending the title to the Bon Voyage claim against the claims of third parties claiming ownership in the ground adverse to the title of Whittren, and the alleged title of the plaintiff in this case.

Mr. MURANE: We make the objection to that offer that it is immaterial and irrelevant, and that no such expenditure, such as is contemplated under any rule of law and under the rule allowing

the defendant his expenses made in good faith in the mining and developing of the Bon Voyage claim.

The COURT: Objection sustained.

To which ruling of the Court the defendants and each of them then and there excepted, which exceptions were allowed by the Court.

Mr. COCHRAN: I don't mean to be understood that there was any contract of that kind between the plaintiff and these defendants; the contract referred to was between Eadie and Waskey and Waskey and Whittren.

The COURT: Yes; we understand that.

(Whereupon a certain paper writing was produced.)

251 Mr. ORTON: We have here the original lease executed on the 11th day of June, 1906.

Mr. GILMORE: No objection to putting in the original.

The WITNESS (continuing): That is my signature. (Referring to the paper.)

Mr. GILMORE: We admit the signatures and execution of the leases, both of them, and for the purposes of the record are willing to have the two leases, in the original substituted for the certified copies which have heretofore been introduced in evidence.

Whereupon the papers were received in evidence, marked Defendants' Exhibits "I" and "J" respectively, and were read to the jury and were in the words and figures following, to wit:

DEFENDANTS' EXHIBIT "I."

Lease, June 11, 1906, Eadie, Whittren and Waskey.

This Indenture made this eleventh day of June in the year nineteen hundred and six, between Andrew Eadie and J. Potter Whittren, both of Nome, Alaska, lessors, and F. H. Waskey, of the same place, lessee, witnesseth:

That the said lessors for and in consideration of the rents royalties, covenants and agreements hereinafter reserved and contained and by the said lessee to be paid, kept and performed, do hereby lease, demise and let unto the said lessee all the following described lands and premises situate in Cape Nome mining and recording district, District of Alaska, to wit: Commencing at the south-

252 west corner stake of the Bon Voyage Placer Mining Claim; thence northerly along the westerly boundary line of the said mining claim 1320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1320 feet to the southerly boundary line of said mining claim; thence westerly 220 feet to the point and place of beginning; being a part of the said Bon Voyage Placer Mining Claim, the location notice whereof is of record in the office of the recorder of said Cape Nome recording district in book 99 at page 296 of the records of the said district.

To have and to hold all and singular the said demised premises, together with the appurtenances, unto the said lessee for the term

commencing on the date hereof and expiring at noon on the first day of June, nineteen hundred and eight, unless sooner forfeited or determined through the violation by the said lessee of any covenant or agreement hereinafter contained and by him to be kept and performed.

And in consideration of such demise and lease the said lessee does covenant and agree with the said lessors as follows, to wit:

1. To enter upon the said premises within five days from the date hereof and thereafter to prospect, work and mine the same in good and miner-like manner so as to take out the greatest amount of gold and gold-dust therefrom, with due regard to the continued future working of the said mining claim and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously during the term of this lease; cessation of labor for a period of ten days to be deemed a violation of this agreement.

2. To properly timber all shafts and keep all shafts, tunnels, drifts and stopes clear and in good and safe condition.

3. To allow the said lessors and their agent or agents, at all times to enter upon and into all parts of the said premises, for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort.

4. To give to the said lessors, at Nome, Alaska, at least ten hours' notice of each and every cleanup, and to make no cleanup without giving such notice.

5. To make and file for record an affidavit of the performance of the required annual labor upon the said mining claim, during each calendar year of the term of this lease.

6. To pay to the said lessors, as royalty, thirty-five per centum (35%) of all gold, gold-dust, and other precious minerals and metals mined or extracted from said premises during the term of this lease, and to pay and deliver to the said lessors such royalty out of and immediately after each and every cleanup.

7. To allow no person or persons not in privity with the said parties hereto to take or hold possession of the said premises, or any part thereof, under any pretense whatever, during the said term.

8. Not to assign this lease, or any interest herein, and not to sublet the said premises, or any part thereof, without the written consent of the said lessors.

9. To quit and deliver up to the said lessors the possession of the said premises x———x in good order and condition for continued future mining, without demand or further notice, on said first day of June, 1908, or at any time previous upon demand for forfeiture.

It is expressly agreed that, upon the violation by the said lessee of any covenant or agreement herein contained, this lease, and the term hereof, shall, at the option of the lessors, become forfeited and determined, and the said lessors may at once enter into the possession of the said premises and remove any and all persons found thereon.

Each and every part and covenant hereof shall extend to and be binding upon the heirs, executors, administrators and assigns of the lessors, and at the option of the lessors, the executors, administrators and assigns of the said lessee.

255 In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Done in triplicate.

ANDREW EADIE.	[SEAL.]
J. POTTER WHITTREN.	[SEAL.]
FRANK H. WASKEY.	[SEAL.]

Signed, sealed and delivered in the presence of:

F. E. FULLER.
A. G. BLAKE.

DISTRICT OF ALASKA,
Cape Nome Precinct, ss:

This is to certify that on the 11th day of June, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

Witness my hand and notarial seal this 11th day of June, A. D. 1906.

[NOTARIAL SEAL.]

F. E. FULLER,
Notary Public for Alaska.

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DEFENDANTS' EXHIBIT "J."

Agreement, June 20, 1906, Eadie, Whittren and Waskey.

This agreement made this 20th day of June, in the year nineteen hundred and six, By and Between Andrew Eadie, J. Potter Whittren and F. H. Waskey, all of Nome, Alaska, witnesseth:

Whereas, the said Eadie and Whittren are the owners of the *Box Voyage Placer Mining Claim*, situate in the Cape Nome Mining District, Alaska, the location notice whereof is of record in the office of the Recorder of the Cape Nome Recording District, in book 99 of the Records of said District;

And Whereas, the said Eadie and Waskey desire to work and mine the easterly 440 feet of said mining claim, being all of the said claim not heretofore leased by the said Eadie and Whittren to the said Waskey;

Now, therefore, in consideration of the premises and of the sum of One (\$1.00) Dollar, by the said parties paid, each to the other, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is agreed as follows:

The said Eadie and Waskey agree to enter upon the said premises within one days from the date hereof, and thereafter to prospect, work and mine the same in good and miner-like manner so
 257 as to take out the greatest amount of gold and gold-dust therefrom, with due regard to the continued future working of the said premises and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously for the full term of two (2) years from the date hereof, or until said premises shall have been thoroughly and completely mined and worked out; cessation of labor for a period of ten (10) days to be deemed a violation of this agreement;

To properly timber all shafts and to keep all shafts, tunnels, drifts and stopes clear and in good and safe condition:

To allow the said Whittren or his agent at all times to enter upon and into all parts of the said premises for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort, and to give said Whittren or his agent due notice of each and every cleanup.

It is agreed that of all the gold, gold dust and other precious minerals and metals mined or extracted from the said premises by the said Eadie and Waskey, under this agreement, one-eighth (1/8) part shall be paid and delivered to said Whittren immediately after each and every cleanup, and one-eighth (1/8) part to the said Eadie, and the remainder shall be retained by, and equally divided between, the said Waskey and Eadie, after paying from such remainder of all costs and expenses of mining and
 258 F. E. F., operating under this agreement; *the expense of first N. P. locating pay, however, to be borne solely by said Waskey.*

In witness whereof, the said parties have hereunto set their hands and seals in triplicate, the day and year first above written.

[SEAL.]
 [SEAL.]
 [SEAL.]

J. POTTER WHITTREN.
 ANDREW EADIE.
 F. H. WASKEY.

Signed, sealed and delivered in the presence of:

P. D. OVERFIELD.
 P. E. FULLER.

DISTRICT OF ALASKA,

Cape Nome Precinct, ss:

This is to certify that on this 30th day of August, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument and acknowledged that they executed the same freely and voluntarily.

Witness my hand and notarial and Notarial Seal this 30th day of August, A. D. 1906.

[NOTARIAL SEAL.]

F. E. FULLER,
Notary Public for Alaska.

Cross-examination by Mr. MURANE:

The WITNESS (continuing): I don't know whether there were any cleanups made from the dumps that were extracted this
259 winter or not; I don't know as to that. In our operations last fall we unintentionally got over the line onto the easterly portion and some of the ground that was sluiced up came from the easterly shaft, through the shaft on the westerly hole, and when the fact was recognized, then I know we recognized the difference in the royalty between twenty and thirty-five per cent in order to account properly as nearly as possible with the way we held our leases. It was simply extracted for a time by mistake and came out of the holes on the westerly portion. I think that some of the gravel taken out of the easterly hole has been washed. I think it has been sluiced, but I don't think it has been cleaned up. I do not know exactly; it is my impression that some of it has been washed but not cleaned up; I don't know just how I got that impression now. I don't know. I understood it was some way, some of it had been washed this summer along after I came in. What I have heard or learned about the operation has been just generally what I have learned from others about the situation out there. I was not there during the operations last winter after the close of navigation. It is my best recollection and judgment, from what I know, and what I have seen and learned, that what has been cleaned up came from the westerly hole. It is my impression from what I have seen and learned that there have been no cleanups made from the easterly shaft. All that has been sluiced
260 still remains in the boxes. That is not included in the seventy-five thousand; the seventy-five thousand is what has been really extracted, and it is my impression that that has been taken from the westerly shaft. I think one of us is mistaken in this testimony—I think probably it is my mistake, but I think I made a mistake in saying that my expenses were eighteen thousand from the easterly shaft; I think the expenditures were fourteen thousand from the easterly shaft, and eighteen thousand from the westerly; I have not given any of the details in regard to these expenditures; those are the expenditures in the books, as I recall now. That does not include expenditures in this case. I am just referring to what they were up to the time of the allowing of the injunction. I may state that there has been expenditures, necessary expenditures since Mr. Crabtree has gone out, considerable money, also some back bills which never came in before that time, up to the time and just before he went out, have been paid since he went out, and there is some more money owing now, but I do not know just the amount—we owed some money, I do not know just the amount—we owed some money, I do not know just how much, but several hundred dollars; I know that has been

paid since then; that is included in that amount of fourteen or fifteen thousand. That is not shown on the books; there have been some bills presented and paid that are not entered upon the books, since Mr. Crabtree went out. I do not know what they were; they were not entered at the time. Some of it was for wages, and I think

there are also some wages outstanding that have not yet been
261 paid. I do not know what the amount of them is. I have no idea. That fourteen thousand has been expended in taking

out the dump that is out there yet, and has not yet been washed up. It was expended in taking out the dump from the easterly shaft, in installing the machinery to take out the dirt, and such expenditures as are necessary to the installation of a plant. There was a very good plant and outfit, engines, hoist, boilers and cage, in one hole there was a cage and car, and in the other a self-dumper, et cetera. At the westerly hole there were two boilers; I don't remember exactly what the sizes were, somewhere about fourteen inch, I guess; one that I remember cost about three hundred dollars; the other one was worth about four hundred, I should judge, five hundred possibly; at the easterly hole there was an engine known in this country as a — marine engine; I don't know just what that was. I don't know what the horse-power of that one was, and I don't know what was paid for that. We had two engines, hoists, hose, cages and cars. There was one cage and cars. The westerly hole was operated with track and cars, and the easterly hole with self-dumper and buckets. I don't know what was the value or the cost of all of the machinery used in operating the mine. I think that the book possibly will show. I think that you will find that all of our accounts are properly segregated there. A portion of the machinery has been moved away from there since this spring. A strict account has been kept of everything taken away from there

and the value has been credited through the books, but I do
262 not know what the amounts are; the books will show. I don't know what the credit is. The value and cost; the original

cost, less the value of the machinery for the time it was placed upon the ground and should always have been charged up to this mine as an expenditure against the mine, at the full value; at what it cost us. As to whether or not this machinery is now in my possession today or not, I could not say; I loaned the hoist from the westerly hole, and also loaned the boiler from the westerly hole; I could not say they are in possession of myself at the present time; I am not using it at present, at any rate. I could not tell you what this machinery was worth. I would not want to state; the books will show; I would not want to state, because I do not know. I can ascertain that from my books approximately. If I am not mistaken, there is an account known as "Equipment Account," which will show that; there should be an equipment account and a machinery account and a mining supply account; I think there are those accounts kept; I understand so. I don't know how many days I put in there, at fifteen dollars a day. I went onto the ground when I first took the lease, assisted in the work, superintended the installing of the plant, and was on the claim more or less up to the time that I left last year;

I don't remember the date I went out when I left here last year. I presume that I was around there somewhere around seventy or eighty days—I don't know—seventy days—I don't know; I
263 didn't keep any time. I don't know, because I kept no account of it. Somewhere around seventy days; that is only just generally. Mr. Crabtree was in charge there from the time I left last fall until the mine closed down this spring. I do not know whether or not a charge has been made for his services in these expenditures. No charge has been made for my time; if so, I have never received anything anyway. I know that I never have received any wages.

Redirect examination.

(Questions by Mr. ORTON:)

The witness continuing: I have forgotten the date when I went outside. It was about the 1st of October; I don't know exactly. It was either the last part of September or the first of October. Say, sometime between the 1st and the 10th. After I left, I left the entire management in the hands of Mr. Crabtree. During the winter until the time we were closed down about the early part of June. I think Mr. Crabtree is a competent miner. He has had much experience. Some of the machinery is in fair condition; some of it is entirely unserviceable—some of it is as good as it ever was. Some of the injectors and fittings and things of that sort are entirely worn out. I should think that the whole outfit had depreciated in value more than fifty per cent; some of the machinery has decreased greatly in value; some not so much; some, a small proportion, I should think was as good as ever, and some entirely worn out and of no use whatsoever. I could not say exactly the percentage that it has
264 decreased in value; at least half and probably a great deal more.

Recross-examination.

(Questions by Mr. MURANE:)

The WITNESS (continuing): I don't know what time we shut down; it was some time before I got in in the spring; I was not here at the time the mine shut down. I understood it was about the 1st of June, I don't know myself.

Whereupon it is admitted by the respective parties in open court that the date when the defendants ceased work was about the 1st of June, 1907.

I don't know how long the mine was shut down during the winter. The time book would naturally show that.

Whereupon the witness was excused.

Whereupon F. E. FULLER was recalled as a witness on the part of the defendants and testified as follows:

(Questions by Mr. COCHRAN:)

The WITNESS: I stated that I saw this deed marked Plaintiff's Exhibit No. 1, the altered deed, in my office two or three weeks after it was filed for record in July last. I saw it there in the office. Dr. Chambers called for it sometime in September. I don't think there was anybody with him the first time he called. He called there to inquire about the deed. I had several conversations with the doctor about that time, about the marks and about this deed. He wanted the deed, and I told him that I had been notified by Mr. Whittren that it was not his deed and not to let it go, and that I didn't feel like giving it up just then. He talked about the alteration of it. He said that they had fixed it up there in the office. *He said that they had fixed it up there in the office.* That he and Whittren had. He said he had made the erasures on it with chemicals.

Cross-examination.

(Questions by Mr. GILMORE:)

The WITNESS (continuing): He did not say that he had furnished the chemicals but that Mr. Whittren had done the writing. He did not say that he had furnished the chemicals to Mr. Whittren in his office. He did not say that. It is not a fact that he told me that he had furnished the chemicals but that Potter Whittren had made the change. He told me at that time that the writing was in Mr. Whittren's handwriting. He did say that. He said that he had made the erasures, but that the changes were in. Whittren had made the change. He told me at that time what he stated to me. He stated at that time that the change had been made by mutual consent between the two of them, Whittren and himself.

Whereupon the witness was excused.

Whereupon Mr. ANDREW EADIE was recalled as a witness on behalf of the defendants, and testified as follows, to wit:

(Questions by Mr. COCHRAN:)

The WITNESS: I know Dr. Chambers. I had a conversation with him in Nome with reference to the altered deed Plaintiff's Exhibit No. 1. I was just coming in from the claim one day; just the day after Dr. Chambers came into Nome, and Mr. Whittren was with me, at the foot of Steadman Avenue and Front Street, we met Dr. Chambers. He said there that he did the chemical part towards obliterating part of this instrument and that Whittren did the writing. He done the chemical part and Whittren done the writing.

Cross-examination.

(Questions by Mr. GILMORE:)

The WITNESS (continuing): The first time I ever saw that deed was in the courthouse here last fall. At the time of the hearing upon the injunction, I only saw it over the shoulder of another man, here in the courtroom; I saw the paper they called the deed at the time that had been changed; that is all I know about this particular paper, if it was the same or not. That was in October. This conversation I have related occurred down on Steadman Avenue in September, the first time I seen Dr. Chambers up here. I didn't see the deed until October, but I knew what he was talking about down there on the street in September. The doctor said he done the chemical part erasing, and that Whittren had done the part of writing. The chemical part on this deed here that I saw last fall. I did not know anything about the deed at that *ti* time in September. I never saw it until in this courtroom. I swear positively that I

never saw the deed before October. I presumed in September, when the doctor said he had done the chemical part, that he referred to this deed. I never saw it until October, but I knew of the existence of this deed when it was put on record the first part of the summer in 1906. I did not examine it in the recorder's office; I never saw it. Down there that day the doctor was coming up and wanted to shake hands with Mr. Whittren. This was a day or two after Dr. Chambers got in from Seattle. There was a good deal of a row going on and some loud words. There was no blow struck. There was no effort to strike at all. Then we walked away. There were very few words said between Mr. Whittren and myself on the one side and Dr. Chambers on the other. Mr. Whittren made a remark that he was going to make trouble for the doctor for changing a deed. I didn't understand that he said he had furnished the chemicals "but you did the work." He said he had done the chemical part. I didn't understand where it was. He said: "I done the chemical work but you done the writing." He said he furnished the chemical work but you done the writing. Whittren said nothing to that, he turned away and there was nothing said after that that I remember. I do not remember that he said he was going to send the doctor to the penitentiary for forging a deed. I only heard Dr. Chambers say that part and then I went away; I didn't want to hear what they were trying to quarrel about at all. All that I remember now hearing the Doctor say was that the Doctor done the chemical part and Whittren done the writing. I don't
268 remember any of the details of the rest of the conversation that occurred on the street that day.

Redirect examination.

(Questions by Mr. COCHRAN:)

The WITNESS (continuing): Potter Whittren had told me about this deed prior to the time I seen it in October. Whittren told me about the deed about the time it came in and was put on record;

Whittren told me that there was a deed on record; that was the first I heard of it. He told me then something about its having been changed chemically.

Whereupon the witness was excused.

And thereupon Mr. L. WHEELER, a witness called on behalf of the defendants, having been duly sworn, testified as follows:

(Questions by Mr. COCHRAN:)

The WITNESS: My name is T. J. Wheeler. I reside in Seattle. I have lived in Nome since 1900. I have been here every year since that time. I know Dr. Chambers, the plaintiff in this case. I am not sure. I think I have known him since 1900. I know Mr. J. Potter Whittren; I think I first met him the year they were selecting the *dight* for the schoolhouse in Nome. It must have been in 1900 or 1901, I think. I think it was about the time when Dr. Chambers was a member of the school board in Nome. Sometime after I came to Nome in 1906, I don't recollect the exact time, there was a conversation had in my presence with Dr. Chambers in reference to changing a deed, or with reference to a deed from Whittren
269 having been changed. It was in the latter part of September, I think, sometime in September. That conversation was held here in Nome on the street. No one was present, the doctor and I were talking. I spoke to him something about the trouble. He didn't say he had used the chemicals and erased the interest specified. He didn't mention about chemicals. I was talking with him about the fuss between him and Whittren, and I said that Mr. Whittren claimed he had changed a deed from a quarter to a half; he said, I admit that, but Whittren was present or knew of it. That is just about what he said exactly.

Cross-examination.

(Questions by Mr. MURANE.)

The WITNESS (continuing): I had come from Solomon. I had been down to Solomon during the summer. I could not say exactly how long after I returned from Solomon it was that this conversation took place. I could not state when I returned from Solomon. I was acquainted with Mr. Whittren in Seattle and was his partner there. The first year we went out, I think 1902, we were out together. I remained in partnership with him until sometime after the year of 1903, maybe a month or two, I don't recollect, a short time. It was in the month of September, when I returned from Solomon last year. I met Dr. Chambers here in Nome a great number of times. This conversation with him was had on the street, somewhere near the Barracks square. I should say
270 that that was in September. It was about the time of my return from Solomon, not long after my return, towards the end of September but I am not positive now. It was prior to his commencing suit. I could not tell you how long prior. I cannot fix any date in September, October or November that I think it was. I

can't tell you any date. It was after I returned from Solomon, I know that. I cannot tell you when I returned from Solomon. I had seen Dr. Chambers several times before this conversation took place. The first time we met we talked about this trouble between the Doctor and Whittren. I came in from the outside in the summer of 1906. I arrived here on the 4th of July, and I went to Solomon in about a month. I had not seen the Doctor before I went to Solomon. Before this conversation he told me about his trouble with Whittren. He told me about the matter in the second or third conversation we had, in fact, every time I met him he asked me what Whittren had said and how Whittren felt. I told him that Whittren claimed that he had changed a deed from a quarter to a half. He said that he admitted that but Whittren knew it. He admitted that the change had taken place. He did not tell me that a change had been made by consent of himself and Whittren; he did not use that language. He never said that to me. He said that Whittren knew of it. He said it as near as I can remember in about those words which I have given you. I know that this was after I returned from Solomon. I remember it was after I returned

271 from Solomon, I know that. I could not say what date I returned from Solomon without looking it up. I know that it was after I returned, a few days, but I couldn't give any date. It was just about the time he was commencing suit. It was just about the time he had employed your services. I think he had employed you then. He told me. I don't think suit had been commenced then because I was trying to get him and Whittren together. He said he didn't know what to make of Whittren that he never could have believed he was the kind of a man to have acted as he had acted. He talked generally over their trouble; he said he didn't propose to be buncoed in the matter. I told him I thought it was a matter, they both being good Masons, that they could make terms in some way or another, or something of that kind. Dr. Chambers did not use the word "one-quarter" in that conversation with me.

MR. MURANE:

Question. And you took it because he had assented to what you had said, and said that he admitted it, but that the change was made by Whittren, or that Whittren was present and knew all about it, that he then stated or assented to the fact that it had been changed from quarter to a half, and that is the way you arrived at that, is it?

MR. COCHRAN: That is objected to as irrelevant and immaterial, not what he took it *of* he but what he stated in the conversation.

272 That is not proper cross-examination, and is only an attempt to get before the jury an impression made upon this witness or deductions made by this witness and not a proper form of cross-examination.

The COURT: Objection overruled.

To which ruling of the Court, the defendants, and each of them, then and there, excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): That is the way; yes.

Defendants' Exhibit "K."

ENLARGED PHOTOGRAPH OF DEED, WHITTREN TO CHAMBERS.

Know All Men by These Presents:

That

Frederick Whitten
of the City of Nome, Alaskafor and in consideration of the sum of One DOLLARS
of the United States of America, to Frederick Whitten in hand paid by

of the same place.

the party of the second part, the receipt whereof is hereby acknowledged, do hereby these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns One-half (1/2)

of the following described property

French Claim known as the "Necky Beach" opposite No. 2 on "Necky" Bay, a tributary to Nome River, situated Jan. 1st 1902.

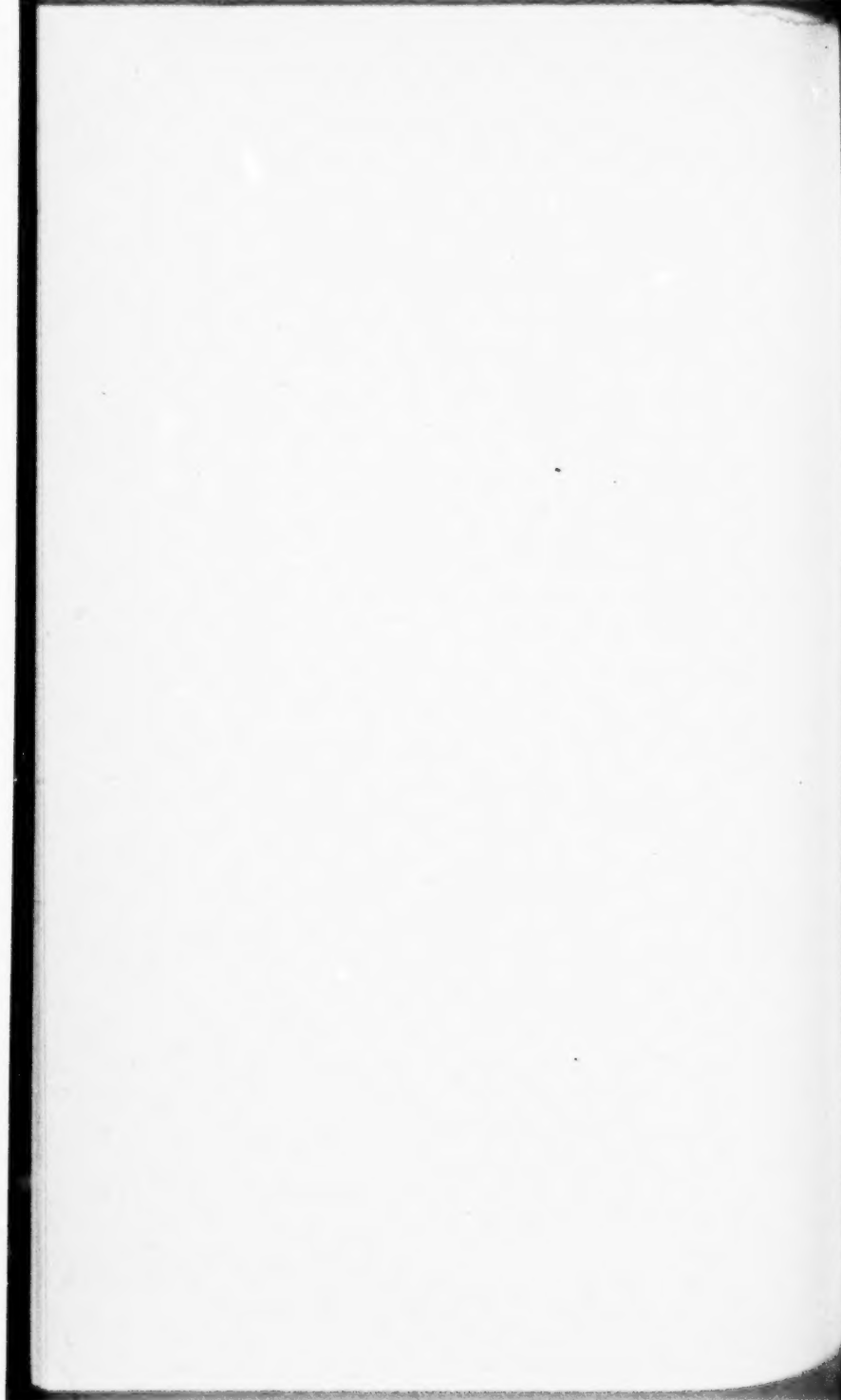
The "Bon Voyage" French Claim on the left bank of Norton Gulch opposite No. 3, about 1500 ft. to the south east, situated Jan. 1st 1902.

No. 5 Little Creek a tributary to Snake River, situated on a pasture at No. 5 below a crossing on Little Creek, all of the above being in Cape Nome Township Alaska, District of Alaska, and situated by Frederick Whitten

I have and to hold, the same to the said party of the second part, his executors, administrators, assigns, forever, unto the said party of the second part, his executors, administrators and assigns, to warrant and defend the title of the said property, unto the said party of the second part, his executors, administrators and assigns, and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, I have hereunto set my hand and seal the 21st day of June, in the year of our Lord one thousand, nine hundred, and one.

Frederick Whitten



(Testimony of Dr. J. J. Chambers.)

Defendants' Exhibit "L."

ENLARGED PHOTOGRAPH OF DEED, WHITTREN TO CHAMBERS.

.....
of the United States of America, to *James Place* in hand
received.
the James Place
receipt whereof is hereby acknowledged, do hereby these
unto the said party of the second part *James Place* executors, &
James Place (11/2)
the James Place
James Place
James Place



Redirect examination.

(Questions by Mr. COCHRAN.)

The WITNESS (continuing): I think I understand that last question. I have no interest in this litigation at all. I feel friendly to both parties to this litigation.

The witness excused.

Whereupon Mr. J. J. CHAMBERS was recalled as a witness by the defendants, and testified as follows, to wit:

(Questions by Mr. COCHRAN.)

The WITNESS: I have a large photograph taken of the deed offered in evidence by myself, marked Plaintiff's Exhibit No. 1, and particularly the changed part. I don't know where those photographs are now; they are not in my possession. They are in the office of either Mr. Gilmore or Mr. Murane. They are not in my possession. (Photographs produced.) These are the photographs I referred to which I now have in my hand. I had other photographs made; Judge Murane has one. This photograph which you hold in your hand is a photograph of Exhibit Number 1, 273 the deed. This is one of the two photographs I told you I had made (indicating.) This was taken over at Nowell Studio, over beside the Golden Gate Hotel, I believe. Mr. Harrison or Mr. Know took it—it was taken over at this gallery beside the Golden Gate Hotel. I had some photographs of this instrument taken prior to that time. A large one was taken at Dobb's gallery along last June. Mr. Fink has it in his hand (paper produced). This one was taken some time the latter part of last week.

Mr. COCHRAN: We offer these photographs in evidence.

Mr. MURANE: No objections.

Whereupon the photographs referred to were received in evidence, and marked Defendants' Exhibit "K" and Defendants' Exhibit "L," and exhibited to the jury, and the following are true copies of the same:

(Here follow photographs marked pages 274 and 275.)

The WITNESS (continuing): I closely examined the deed
276 prior to the time this photograph Exhibit "K" was taken. It
had not been changed in any manner at that time, other than
the change that was originally made upon it. That deed was not
changed in any manner after the photograph was taken. I never saw
any figures under the "one-half" myself. I never saw any figures under
the one-half. I remember you trying to represent that you were
able to see something there at the time of the injunction; I never was
able to see them. I never have been able to see them; I thought
if I should have a large photograph made, I should be able to see
them if they were there; but I never have been able to see them even
then; there does not seem to be anything resembling a four under
the half so far as I am able to see. I did not do any pencil writing
of any kind upon the deed, Plaintiff's Exhibit No. 1, after these
photographs were taken. I did not do any pencilling, or writing
or marking of any kind upon this deed prior to the time this
photograph was taken (K.) Nor on this one Exhibit "L." Neither
prior or subsequent. I had some chemical ink erasers there in my
office at the time this erasure was *was* made on the original deed.
We had some there that was purchased at Lowman & Hanford&s, by
a friend of mine from Chicago, as I stated some time ago, which had
been left there in my possession, *in my possession*, setting there on
my desk. He was in Seattle on his way to Dominion Creek, Daw-
son, to serve some papers, and on his way going up or coming
277 back, I don't know which now, there were some changes to
be made in some instrument there in Seattle; he was only
there for one day and he called in to see me, and while he was
calling to see me he wanted to make some changes in some papers,
and he went down to Lowman & Hanford and got some of this
chemical ink eraser—I suppose he went down to Lowman & Han-
ford's; I don't know about that, but anyway he brought some of the
chemical up there and used it in a hurry, and left it there in my
office; it never was used but that once before and also at this one
time, when Whittren was there, and it was used this once then. I
gave Whittren the chemical to take out this old writing, and then he
wrote in this alteration which appears on the face of this deed now.
I did, you bet I did; I never denied it; I had the chemical there
and got it off the desk and showed it to him, and he used it there, in
the office. Mr. Whittren was there in affecting this change and in
writing in this other writing it may have been half an hour, or it
possibly may have been an hour; I don't remember the length
of time. He was making the change while I was out in the outer
room talking with some patients, talking to some one asking a
question or something of that kind; I don't know just what it was
but I had stepped out in the other room I know—I wasn't right in
the room for some few minutes, and when I came back—I couldn't
say how long I was gone—I don't know—Oh, say, five minutes—it
may have been ten or it may have been less even than that.
278 I don't know that it was ten minutes, it may have been more;
may have been fifteen, I won't swear that it was only ten
minutes. I don't think it was over fifteen minutes. I
don't think it could have been fifteen minutes. I don't

know that he handed the deed back to me all changed; I won't say that he did, no, it might be that it was not completely changed when I went back into the room. I gave Mr. Whittren the chemicals and went out to talk with somebody in the other room. I may have been gone not over ten minutes; I don't say that fifteen minutes elapsed—I don't know. I was gone not to exceed fifteen minutes. When I came back Whittren had made some changes on the deed. He had used the chemicals and had taken out—had taken out the three-quarters; and the letters three-quarters, had been taken out and then when I came back where he had taken out the three-quarters was not dry; he was just finishing that up when I came back in. I says to him, "Whittren, wait for it to get good and dry—don't be in such a hurry—you must wait for it to get dry; you will spoil it by writing on it before it is dry." So he put a blotter in it once or twice and stamped down on it once or twice and then shook it a little and then he said, "I guess that is all right now," and then he wrote this part here (indicating), and it was the least bit damp there still and you will notice that that part there seems to be written in deeper, so that the marks show there right back
279 of these heavier figures—I think that is what you see back there. It shows a little bit heavier in the figures which he wrote in last. I am pretty sure that at the time he was making this change I was out in the other room seeing some patients or somebody. It was in the adjoining room. There was no door to the room; that is, it had a door out into the hall, but there was a sort of hall way running crossing between the room and the main hall, No. 602 Alaska Building, it belonged to another single room; there was another door opening into another room, but it was always closed; it was somewhat of a double room, with a hall leading across it and off this hallway there was this room partitioned off; the double doors into this separate room were always closed. There was no door opening from one room into another. You could not hear what was going on from one room to another. It was not meant to be heard from one room to hear through the walls. The walls were double. There was nobody there in the room at the time when Mr. Whittren made this change, nobody but the two of us when I came in from the outer room; just Mr. Whittren and I. This deed was originally for a three-quarters interest. I left Nome in September, 1902; I went back to Ohio; I came back to Nome in September, 1906; last year. I was in Seattle just previous to coming to Nome. I went back to Seattle shortly after I left Nome; made Seattle my home; moved my family there, and engaged in the practice of my profession in Seattle.

Whereupon it is agreed by the parties in open court that the plaintiff, Dr. Chambers, will be recalled to the witness-stand
280 in rebuttal, when defendants' counsel may cross-examine him fully.

Whereupon the witness was excused.

Whereupon Mr. ANDREW EADIE was recalled as a witness on behalf of the defendants, and testified as follows:

Mr. COCHRAN: Under the ruling of the Court, I have recalled Mr. Eadie for the purpose of making an offer.

Defendants offer to prove by the defendant Eadie that on or prior to the 20th day of June, 1906, the defendant Whittren and Frank H. Waskey were in the possession—that he, Eadie, together with the other two defendants just named to wit, J. Potter Whittren and Frank H. Waskey were in the possession of an undivided one-half of the Bon Voyage Mining Claim described in plaintiff's complaint; that on the 20th of June, 1906, this defendant and the defendant Waskey went upon said claim upon the representations made by the defendant Whittren and did in good faith and without any knowledge whatsoever, or means of knowledge, of the pretended claims of the plaintiff in this case, of any interest in the Bon Voyage Mining Claim entered into a lease with the defendant Whittren and the defendant Eadie to the easterly four hundred and forty feet of said mining claim, and immediately and pursuant to said lease, did contract for and make large expenditures in the development and mining of the easterly four hundred and forty feet of said mining claim and expended in that behalf upwards of some ten
281 thousand dollars, large sums of which were expended in prospecting and developing the mine, and was expended in making the mine a producing mine which had theretofore been a non-producing mine, said mine being of no known value.

Mr. MURANE: We object to the offer, first on the ground that the offer is too broad for to permit the Court to rule upon the offer, or for the counsel for the plaintiff to make objections to the several parts of said offer without its being segregated; for the further reason that a great portion of the offer is wholly irrelevant and immaterial and not within the issues of this case, and under the rulings of the Court heretofore made, the offer contains no offer to prove any notice to the defendants, and is wholly irrelevant and immaterial, and under the rulings of the Court upon other offers of the same character the offer itself is inadmissible because no such issue has been pleaded.

The COURT: Objection sustained.

To which ruling of the Court the defendants and each of them then and there excepted, which exceptions were allowed by the Court.

Mr. W. F. FULLER was recalled as a witness by the defendants and testified as follows:

(Questions by Mr. COCHRAN:)

(Defendants' Exhibit "L" handed to the witness.)

The WITNESS: After examining the photograph marked Defendants' Exhibit "L," purporting to be a photograph of Plaintiff's Exhibit No. 1, I will state that from the photograph, the
282 condition of the original deed is not the way the instrument

appeared at the time when the deed was exhibited in court upon the hearing for the injunctive order.

Cross-examination.

(Questions by Mr. MURANE:)

The WITNESS (continuing): The change particularly is around the figure 1. At that time there were some marks upon there. Some marks around there at that time, quite visible. They don't appear there as they did at that time. I could not make out what was written underneath. There was something underneath. There were some marks each side of that 1, as I remember; on each side of the 1. I could not make out what the figure was. I could not make it out.

Question. Now, Mr. Fuller, I would like to ask you if you can discern any mark, commencing right here (indicating), going right down here and around here in the shape, of in the form of a figure 3, right on that instrument now, right back of the 1—I direct your attention particularly to that mark right in there (indicating) running around there like that and running around this way—can't you see evidences of a mark there now of the figure 3?

A. Well perhaps it is shaded a trifle more is all.

Q. It is shaded a trifle more there, but would it not form right at the present time—is it not in the shape of a figure 3, the
283 mark that you can see shaded over there now?

A. I could not say that it is; there are some shadows there.

Q. There are some shadows there, you would not say whether or not the shadows that you refer to commencing right there and running around there plainer around on this side here (indicating) do you notice those shadows there at that point, commencing right here, right there, and running down around there—do you notice any heavier shadings there?

A. There are perhaps more shading there is all I can see.

The WITNESS (continuing): I notice a shadow here (indicating.) I don't think it continues over there. I could not tell whether that is a line right there or not. I cannot see that the color makes a straight line downwards. I can see evidences of lines under the one-half. I can't say whether that is a line there or not, it might be a slight weave in the paper, or it might be a line or not. The shadow is a little heavier on each side of the letter than in the middle. I can't say from that what it was. From the entire test, from the reading there that letter might be a double "e" or an "n" or aa "u." I should think it should be a double "ee" right in there if it was ever the intention to claim that. The form of this letter looks like an "l" or an "h." There is a line down below the
284 base line; there is a mark there yes. I can see a discoloration down here where this loop is. I can see a discoloration there, and I should think that might be a letter there, but I don't know as I could state what it was. It might be parts of "h r." I have seen *consider of* Mr. Whittren's handwriting. That looks like Mr. Whittren's handwriting. I can see that the two there that you

call my attention to is drawn out and runs down below the base line. There is some similarity in the way the two "t's" are made to which you call my attention, but I do not say that it is the same thing. From my knowledge and examination of Mr. Whittren's handwriting, I should think that that was written by Mr. Whittren or was an imitation of his handwriting. It might make part of a "3," out of what shows there under the words written out "One."

Redirect examination.

(Questions by Mr. COCHRAN:)

The WITNESS (continuing): I can notice a shade running down like this on this side of the letter. The way you indicate it, it represents the figure one. It is all in the way you indicate it to me. Noticing a shade running down this way (indicating), the way you trace it out for me it might indicate an "r." I can't state that I can see the outline of a 3 there; it might be a part of a 3. I notice "the" in the body of the deed, the way it comes down as you indicate. The "th" there and there that you indicate are not written the same. In Exhibit "L" there are some marks there that I can see, but I could not say that they are discernable. There are some there that
285 are discernable. On Exhibit 1, running there underneath the line through the brackets and under the figure 2, there is a little pencil mark there. I think so. I have taken photographs. I don't see any pencil markings on this photograph. I don't know whether they would take or show in a photograph; I don't know whether they would make a shadow or not. If there were any pencil marks on this instrument at the time of the hearing of the injunction I didn't see them. I suppose that a mark with a common pencil upon such material as this paper would show, but I don't know. I never took very many photographs, and I never did any developing at all.

Recross-examination.

(Questions by Mr. MURANE:)

The WITNESS (continuing): I think that the "t-h" which you showed me in that bill of sale and the capital "T-h," are similar.

Whereupon the witness was excused.

Thereupon Dr. J. J. CHAMBERS was recalled as a witness for the defendants, and testified as follows, to wit:

(Questions by Mr. COCHRAN:)

(Paper handed to witness).

The WITNESS: The letter which I hand you now is my writing, my letter. It is a reply to a letter from Mr. Whittren. It is undoubtedly a reply to a letter written to me by Mr. Whittren with reference to the leases of Mr. Waskey. The letter shows for
286 itself. A letter was received by me and the letter which I am now handed by you was in response by me to a letter notifying me of the leases of Mr. Waskey.

Mr. COCHRAN:

Question. You made no objection to the leases to Waskey?

Mr. MURANE: That is objected to because it is immaterial and irrelevant, and it is a question which cannot be raised in this case, anyway. Our objection to the letter in evidence and the question asked by counsel is that they are seeking to estop the plaintiff in some way by reason of this letter, and they have not pleaded any estoppel in this case, nor do they claim to have any leases from the plaintiff Chambers, or from any person representing himself to be representing the plaintiff, Chambers, the lease does not purport to be signed by Chambers nor by any person having any authority to sign his name or enter into a lease, nor to take any possession of any interest of his whatsoever, and they are not entitled to prove in any way any estoppel, because no estoppel is plead.

The COURT: The objection is sustained

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Mr. COCHRAN: For the purpose of saving the record, I desire to have this letter which I have just had identified by the witness, marked for identification, "N."

287 I now offer to prove by the witness upon the stand that on the 24th day of June, 1906, or prior thereto, he was notified by the defendant Whittren of the leases of the defendant Waskey, of the terms of the leases, the terms upon which the leases were given to the defendant Waskey; that he made no objection in any manner to the giving of the said leases, nor the leasing of the ground to the defendant Waskey or the defendant Eadie.

Mr. MURANE: We object to the offer on the ground that it is wholly irrelevant and immaterial, and is not involved in the issues as made up by the pleadings, and that the offer for any purpose is entirely outside of any of the issues as framed by the pleadings; that it is wholly irrelevant and incompetent to prove or disprove any of the issues in this case.

The COURT: The objection to the offer is sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were by the Court allowed.

Mr. FINK: I now offer to prove by the witness on behalf of the defendant Waskey, and on behalf of the defendant Eadie, that it was agreed by the witness and Chambers that inasmuch as the title stood in the name of Whittren, and inasmuch as Whittren was here in the country, and the witness was to remain outside in Seattle, that it was agreed between himself and Whittren, that Whittren

288 was to manage and operate the property for their general benefit, and to make and execute such contracts and leases with reference to it as in his judgment was necessary and proper; that in pursuance to that agreement Whittren did execute the leases introduced by the defendants Waskey and Eadie in this case; that this witness had knowledge of the execution of these leases, but did not object to them, but on the contrary approved of them.

Mr. MURANE: We offer the same objections to the testimony con-

tained in this offer as to the offer just last named; that it is wholly irrelevant and immaterial, under the issues in this case.

The COURT: Objection sustained.

To which ruling of the Court, the defendants and each of them then and there excepted, which exceptions were allowed by the Court.

Mr. COCHRAN: I now offer in evidence on behalf of all the defendants the letter identified by the witness now on the stand and marked for identification Defendants' Exhibit "M," for the purposes stated by my associate counsel, Mr. Fink.

Mr. MURANE: We object to the introduction of the letter if the Court please, on the same ground as stated heretofore.

Mr. COCHRAN: The purpose of it is to show and prove by the witness now on the stand, the plaintiff in this case, that on and prior to the 24th of June, 1906, the plaintiff was notified by the defendant Whittren, that leases had been given to the defendant
289 Eadie, or by the defendants Whittren and Eadie to the defendants Waskey and Eadie, and to show and prove that the plaintiff, the witness now upon the stand, had full knowledge of all the facts and the terms upon which the leases were executed, and made no objections to the leases and permitted the defendant Waskey to spend large sums of money upon the property without making any objections whatsoever to said leases, and also permitted the defendant Eadie, in conjunction with the defendant Waskey, to make large expenditures upon the mining claim in dispute without objection or protest in any manner, and for the further purpose of proving or tending to prove the contention of all of the defendants in this case, to wit, that the agreement between the defendant Whittren and the plaintiff with reference to the title and management of the ground and premises in dispute.

Mr. MURANE: We object to the offer, first, upon the ground that the introduction of the letter in evidence does not in any manner tend to prove any of the matters or things stated at its introduction. Second, that it is wholly irrelevant and immaterial and does not tend to prove any of the issues as made up in the pleadings of the case, and does not tend to prove or disprove any of the issues in the case. That the defendants' contention as to the title of the plaintiff, they
290 have not set up any estoppel or ratification and do not claim that they were lessees in any way connected with the plaintiff, neither by the pleadings or in their proof.

Mr. COCHRAN: I was interrupted in my offer and the purpose for which the offer was made.

Mr. MURANE: I wish my objection just stated to go to the entire offer to prove and the further objection that the statement of the object is too broad for the Court to ascertain whether it has any definite object or not.

The COURT: We sustain the objection.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

(And thereupon the witness was excused.)

Whereupon Mr. EDWARD BREEN was called as a witness on behalf of the defendants, and being duly sworn, testified as follows:

(Questions by Mr. ORTON:)

The WITNESS: I have lived in Nome since June, 1906, the 8th or 9th of June. I know Mr. Waskey. I know the claim called the Bon Voyage. I am a bookkeeper. I kept the books for the operation of the Bon Voyage claim for a part of the time. I commenced about the 1st of December, 1906. Prior to that time there was no regular bookkeeper. I have the books here.

(Whereupon the books are produced.)

The book you indicate is the journal. I entered in these books the account of the expenditures from the beginning as I understand it. I got my information from Mr. Crabtree through Mr. 291 Harding. The book you now indicate, is the ledger. I can take these books and make a statement of the expenses for operating that mine, as shown by these books. So far as I know and to the best of my knowledge I have entered everything in these books correctly. I have vouchers for amounts I have paid out. Right there are the bills. I could from them make up a statement of the expenses taken correctly from the books, the expenses of mining the two shafts on the Bon Voyage. The expenses at the westerly shaft according to my books amount to \$18,655.00, and I would have to have a pencil and figure it out as there is a credit balance here, \$18,656.73. The expense of the easterly shaft, the Eadie Waskey lay, I kept the expense accounts separately from the east and west shaft; \$14,265.58, up to the 1st of July. I think there have been some expenses since the first of July. I could not tell how much. I do not know. The amount of gold taken out there as shown by the books is \$61,261.60. That is the amount received by Waskey. That don't include the twenty-five per cent that was placed in the bank this spring. That just included that total amount received by Mr. Waskey and his associates. I have the vouchers here showing the expenditure of this money. I have a separate account under mining supplies; that don't include the machinery and appliances out there. That includes the mining equipment and the camp; 292 I don't include the camp equipment, just the mining supplies. I mean it don't include the dishes and things of that kind. I am mistaken though, I haven't got it in this set of books. There are three or four different sets of accounts under mining supplies and I have kept them separate. That would be under general supplies. Everything would be under the head of general supplies that would not be under the head of mining supplies. Everything is under the general supply account, everything was recorded under that head. That includes the supplies of every kind, the total expense will all be shown on that and then there were other accounts in the kitchen account and camp account kept separate.

Cross-examination.

(Questions by Mr. MURANE:)

The WITNESS (continuing): I understood that this was a record of only three-quarters. This is the total amount, but \$43,973.66 represents three-fourths of the gold taken out. That is the amount that was taken out of the entire claim this spring. I can't tell what amount was placed in the bank; it would be something like fifty-eight thousand. The exact amount is \$58,631.55. The amount that has been placed in the bank under the order of the court is \$14,657.88½. It makes about seventy-five thousand dollars. The total amount extracted from the claim as I have it here is \$75,919.49.

293 There was no other gold that I know of other than that which I have testified to that was taken from the claim that I know of by the defendants. In my expense account I have not included any money wages paid to Mr. Crabtree. I haven't figured that in any way; nor Mr. Waskey. In my account of expenses the machinery and tools were included in the general expense account. I kept a double entry system of books. I can segregate the principal items of machinery and tools the large items. I can segregate the account and give you the items if you will give me a little time. It would necessitate me going over every journal entry, even if I had the items all here to do it from. I could not do it without considerable work, and it would take some time. I will make up a statement of the machinery account. I don't know if there has been some of the machinery taken from the ground or not I have never been on the claim, yes, I have just been on there. There is no place in my books which gives credit on the machinery that has been taken away from the claim, either in my expense account or any where else. Under my system of double entry bookkeeping I would credit my account with any machinery that has been sold or taken away, and debit the expense with that machinery. There is no credit for that in my expense account that I remember of. In going over the books and making out the statement you ask for I will make a separate statement of any machinery that has been removed and never entered.

294 Redirect examination.

(Question by Mr. ORTON:)

The WITNESS (continuing): I should think the claim was idle last winter about six week; I don't know the date exactly but according to the books; I think it shows in there that it was seven weeks; about six weeks, it may have been seven. With the exception of that time the claim has been in operation all the time up until the 1st of June. I will make a statement showing the amount expended for machinery and tools including the hoists and boilers and engines and matters of that kind that are used in operating the mine, the larger items of the machinery, tools, boilers and that sort of thing, and things of that kind that are still left there, and are not figured in the expense account, and also a statement of

the smaller machinery and camp equipment etc., and have it here in the morning.

Whereupon the witness was excused.

It is stipulated and agreed that Mr. Breen may be recalled out of order for the purpose of introducing the statement which has been called for to be made up from the books.

Mr. ORTON: With that explanation defendants rest, your Honor.

And thereupon the plaintiff offered the following testimony in rebuttal.

295 Mr. THOMAS HARRISON, a witness produced by the plaintiff, on rebuttal, being duly sworn, testified as follows, to wit:

(Questions by Mr. GILMORE:)

My name is Thomas Harrison; I am a photographer; I have been following that occupation for about thirty-five years. During that time I have been in Chicago in business for myself. During that time I have been engaged in all kinds of photographic work. I have attended the camera. Besides being engaged in that business in the City of Chicago I have been engaged since June here. At the present time I am in the photographic business in Nome, at Mr. Nowell's studio, next to the Golden Gate. I am the photographer and operator in Nowell's studio; my duties are general work. I have had experience in photographing writing enlarging writings. I could not state what experience I have had, but I had considerable; I have done considerable of that kind of work in Chicago. I met the plaintiff in this case, Dr. Chambers, the other day. In my experience in Chicago I have been called upon to photograph writings for expert uses in courts. I met Dr. Chambers a week or so ago at least. At that time he exhibited to me a deed. (Paper handed witness.) That is the instrument he exhibited to me. (Exhibit 1.) I made a photograph of that for Dr. Chambers. The photograph which you handed me is the photograph I refer to; this is the one that I made. It is a copy of a portion of that instrument; the portion that shows here. It shows for itself the

296 particular portion. That particular part of the instrument where is shows the yellow stain. It includes all the words of the instrument surrounded by the yellow stain. In my opinion the instrument is now in the same condition it was at the time I photographed it. A yellow stain in a photograph takes dark. This yellow stain took a dark color.

Mr. GILMORE: We offer this photograph in evidence as plaintiff's exhibit, if the Court please.

Mr. ORTON: It is already in evidence.

Mr. GILMORE: We want it in evidence as our own exhibit now and incorporated in the record.

The COURT: Let it be introduced and marked for plaintiff the proper exhibit.

Mr. COCHRAN: It is immaterial for the reason that it is already marked as a defendants' exhibit and is already incorporated in the record, and is simply offering two copies here and encumbering the record, and is wholly immaterial.

The COURT: He wants it to appear that it is his own exhibit now, the same as though he had offered it originally.

Mr. COCHRAN: But by reference to this exhibit marked for the defendants, which is identically the same exhibit, it can be properly identified, and it don't make any difference. We don't like to have the record encumbered by two exhibit numbers for one particular exhibit, for the one same exhibit because it confuses the record.

The COURT: Objection overruled. It may be marked the plaintiff's proper exhibit.

297 Whereupon the paper referred to, being the same paper as was heretofore marked Defendants' Exhibit "L," was received in evidence and marked Plaintiffs' Exhibit No. 14.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): The scale of the enlargement of this photo is about six times, I think. That is to say, that if the original were on an inch, this would be six inches. For instance, take the word "consideration"; if that word were an inch in the original, it would be six inches in the photo. And this space of an inch here is a space about six times as large as in the original. From my experience as a photographer, and particularly with reference to instruments enlarged or enlarged photographs of writings, I am able to state that *any* written defect like erasures will show upon an enlarged scale upon the photo. If there is any evidence there of an erasure it would be brought out in the enlargement. Taking the photograph Exhibit 14, there appears under the word "one-half"; there is a double "e," two "e's" that I can see, and a "q" I can see plainly. The "q" I can see plainly. There is in there that I can decipher, an "h," or it looks like a part of an "h." I can't see whether it is an "h," to state exactly, but there is a long part of it there and also a top there. There is no doubt in my mind, after examining it, that what I see there is two "e's." They show there.

You can only see the upper part of the letter "h." There is
298 the "q" there (indicating). Following the letter "h" in "one-half" I cannot see the "a."

Q. Well, allowing space sufficient for the following letters, after "h" in half, then following the brackets, I would like to ask you if you can see where the figure $\frac{1}{2}$ shows. Are you able to decipher any written marks there of any kind in the background?

A. I can discover a three over the one.

Q. Show the jury where you see the figure 3 in the background over the letter 1?

(Witness indicates to the jury.)

I cannot see any other markings that I am able to decipher plainly. That is a true and correct copy of that instrument sur-

rounding that portion with the discolored marks. I could not say whether there have been any changes or marks placed on that photograph since its delivery by me to the plaintiff. It does not look like it; no. I have not compared it with the negative since its development. I have the negative. I did not see any pencil markings or any markings of any kind placed on this instrument before I photographed it. If there had been any, I don't know. I think I would have been apt to have seen them, of course. I would have seen them, yes, if there had been any, I think. If there had been any marks of any kind placed on the photograph, it would show on the negative, if the negative had not been marked to correspond with the photograph, it would show in the glass. I have not that in court with me.

299 Cross-examination.

(Questions by Mr. FINK):

The WITNESS (continuing): I am an expert photographer.

Mr. GILMORE: There is one question I omitted to ask. Just take the original instrument, Mr. Harrison, and see if you can decipher anything there besides the double "e" you have spoken of as saying that you can see here on this photograph?

A. Well, not plainly, but I can see a little darker shadow there.

Q. You can see a little darker shadow after the double "e"?

A. A little darker shadow but I couldn't decipher anything back of them plainly. I could not say that there were any other marks there. The instrument so far as I can see has some shadow that I can see on the photograph and the print from that is more colored than it would be in the original.

Mr. FINK:

Q. You have a good deal of experience in your line of work, have you not?

A. Yes, sir, I have done considerable in my line.

The WITNESS (continuing): I cannot say what kind of acid was used to make that discoloration there to obliterate what was written underneath the instrument originally; they usually use oxalic acid. I don't know the compound they do use, but I know they use oxalic acid. I could not tell from the paper whether or not acids were used on this occasion. I have never had occasion to use them myself
300 in removing ink stains. I don't know just exactly what the effect would be. I could not tell either how many times the writing has been obliterated. I could not tell that on this particular instrument. I think it would show on the photograph if it had been obliterated two or three times.

Q. Why—suppose they had been completely obliterated—suppose that recently there has been written on that disputed portion, on that portion where the words one-half and the figures $\frac{1}{2}$ are—you understand the portion I mean?

A. Yes, sir.

Q. Just take that instrument laying there on the desk and

examine it carefully. (Exhibit No. 1 handed witness.) You see the part I refer to.

A. Yes.

Q. Suppose that originally there had been written there " $\frac{1}{4}$ " and "one-fourth," and that acids had been applied—what acid did you say?

A. Oxalic.

Q. And after that oxalic acid had been applied and had stayed there long enough, it will completely obliterate any marks on there, will it not?

A. Well, I could not say that.

The WITNESS (continuing): I do not know whether it does or not. It is a fact that the action of oxalic acid is counteracted by some other chemicals. If you first apply the oxalic acid and allow it to cool, it will eat away the ink stain.

301 Q. And then some other chemical is applied to renew it to its original appearance without any ink markings?

A. Well, really, I never have had any experience in that kind of thing, Mr. Fink, and I don't know. I know they use oxalic acid, usually.

Q. Well, do not think that is the word "one-quarter" had been completely obliterated there that the camera would not pick it up.

A. Well, I don't know.

The WITNESS (continuing): I hardly think it could be, with oxalic acid. If the words "three-quarters" had been written in and then the oxalic acid applied to it so as to almost obliterate it, and just leave a trace of it; I could not say, I do not know. My impression is, however, from my experience, and knowledge of the subject, that it would be very liable to leave certain lines.

Q. I agree with you, Mr. Harrison. Now, I call your attention to the photograph marked Defendants' Exhibit "K." You notice along there certain lines that are not exhibited in the one that you have offered. Now, I will explain to you that this photograph is supposed to have been taken in June, this year. Do you see the "one-half" there?

A. Yes.

Q. You can make out what appears to be a "2" along the strokes following the base line?

A. Yes.

Q. Now, right here in the other photographs, here these two strokes on this one, that would be on Exhibit "K"?

A. Yes.

302 Q. Are those two strokes discernable in your photograph below the base line—it appears more in this one that only one stroke comes below the base line.

A. That shows the spaces there plainer than the other one.

Q. It shows traces of the second one but I don't see it traced out in this one? Now, you notice that don't you?

A. Yes, sir.

Q. Well, you cannot see in that photograph exhibited the two distinct strokes of a letter below the base line?

A. Well, there is only one distinct stroke.

Q. And this other one seems to have a little more of the stain, does it not, as though there was something more under the stain?

A. It looks like that, it looks to be, yes, but this impression does not show that line.

Q. And in this photograph it shows just that one line?

A. Yes, it does.

Q. And this one shows very distinctly this other line?

A. Yes, it shows the lines there.

Q. Well, to your mind would that indicate that something had been on that instrument between the taking of this photograph and the taking of this one?

A. Well, I don't know I could not say that.

Q. It would tend that way?

A. Well, it might have printed a little more plainly, and if acid had been used at that time or a change of climate may have affected it some since this was taken, you know. I don't say that it did so but I say that it might have.

303 The WITNESS (continuing): In the taking of this photograph the camera picked up something with greater distinction that did not enlarge in this one at all. It was not a more powerful lense. It appears that in taking this picture the camera picked up something that does not appear in this one at all; with more distinctness.

Q. Naturally the more reasonable inference would be that something had been applied to the surface of this instrument between those two dates, between June, when the photograph you hold was taken, and possibly within the last two weeks when this one was taken, is that correct?

A. Well, I would not say whether anything was done to it, although it shows for itself that there are two lines there that do not appear in this one.

Q. Two lines going below the base line?

A. Yes, sir.

Q. They are very distinct in this one, are they not (K)?

A. Yes, sir.

Q. Now(do you observe in this photograph, Mr. Harrison, that is the one you took (L), do you observe there any lines that could not be accounted for by the words "three-quarters" written in there?

A. I have not examined it closely.

Q. Examine it with reference to that and see if you can see any lines exhibited in that photograph that could not be accounted for by the words "three-quarters" written there?

304 A. No, I don't discover anything.

Q. Except that could be accounted for by the word "three-quarters"?

A. Well, that is what it looks like to me—it could be three-quarters, it looks like it could be a three made out of that under the half.

Q. It appears the same to me that it would to anybody else, that it had originally been written three-quarters?

A. Yes, that is the only ones I can see.

The WITNESS (continuing): This being the "t," there coming up what appears to be an "h," this is the "h," I take it. There they are. Then between this "h" and "a" there appears to have been a "q." It gives pretty much that appearance. The only letter that I can be reasonably certain about is what appears to be a "q." It might be a "q." And knowing that three-quarters must need have a "q," we conclude that it is a "q."

Q. Now, don't you know that if they had obliterated the word "one-half" and then wrote in here what a portion of what might have been three-quarters, then would you not say this was a "u" and a "q"?

A. No, I could not say there was a "u" there.

The WITNESS (continuing): It might be possible knowing that or being informed that that had been done, it is possible that the word there was quarter then I would conclude it was a "q." I don't discover in that photograph anything that could not be accounted for by the words "three-quarters."

Q. Well, now let us take this photograph and see if we cannot see something there that cannot be explained by the words "three-quarters," this being the one made in June, Exhibit "K." See that (indicating) right behind your finger?

A. Yes, I see more marks there.

Q. Now, in this photograph (L), now examine this one; nothing appears that could not be explained by the word "three-quarters"?

A. Nothing that I can see.

Q. And in this one (K) lines appear that could not be explained by the words three-quarters?

A. Well, there are lines there; I don't know what they are.

Q. So that something has happened between the time that photograph was taken and the taking of this one so far as the chemical arrangement of the molecules of this paper is concerned?

A. Well, I could not state definitely about that, because I didn't take the second picture you know.

Q. So that the cameras in this picture (K) picked up something that this one didn't.

A. Well, it might be the paper you know; there are two pictures from two different negatives and it might be that they didn't use exactly the same that we used. It might be there was a smaller negative used by him. I have not made any examination with the view to be sure about that.

306 Q. Now, examine that one there very closely and see if you can see any lines or anything else along in there that could not have been drawn by any mark on the paper?

A. Well, there are some lines there, there are some marks in there, but I could not say what they were made by.

Q. Those lines there are very different, one of them being more distinct than the other?

A. Well, of course it would be pretty hard to say. There are lines in there I can see, marks in there. There are straight lines that run in there, but I don't know what caused them, but you can discover the lines all right.

Q. Now, this along here that looks just like a yellow mark, does it not?

A. It might be a stain, of course.

Q. What is your opinion—you are an expert—has this instrument been altered between the time when this photograph was taken last June and when this one was taken within the last week or so?

A. I could not state that, Mr. Fink. I don't know.

Q. Will you tell me whether or not, in your opinion, why it is that the stain along the words one-half is so much more distinct than the stain along this one?

A. The stain must be a little deeper along there.

Q. More acid was applied there?

A. Yes, or it may have stained the upper around there a little darker.

Q. More acid had been applied there?

307 A. Well, whatever they used, it is evident that it shows a little darker right there.

Q. How do you account, if you do account, that more acid was used to obliterate this than to obliterate this (indicating)?

A. I don't know.

The WITNESS (continuing): I could not say if it would be a reasonable hypothesis to say that acid was applied to this on two different occasions, and only once to this. I told you I had no experience in erasing, Mr. Fink. All I can say is the fact that it shows in the instrument that this yellow stain is deeper and darker here than there. I could not tell whether or not acid had been applied more than once to that distinctly yellow stain across the words one half or not. I do not know. It is evident that it is stained there more than the other, but I do not know what caused it, I don't know why it is. I could not account for that. Whereupon a certain paper was produced.) I see on this paper that a word has been written and obliterated; it appears that it has not been completely obliterated.

Q. So that the user of the chemicals can control the matter entirely by the application of the chemicals. So, in other words, the person using the chemical, can obliterate it completely, or he can obliterate it to such an extent, so that when photographs are made of it, they can trace words or parts of words, those words which he would like to have a trace left of—is that not a fact?

A. I don't know.

308 The WITNESS (continuing): I could not say from my examination of the portion you indicate (on paper which had just been handed witness for in former question) that the camera would pick up any tracing of that. I do not know. If the chemicals were applied so as to leave traces of the word "quarter," if there were traces of it, I think the camera would pick it up.

Q. You think the camera would pick up any traces on the surface?

Mr. MURANE: Objected to as incompetent, irrelevant and not a fair question.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Q. Your opinion would be largely based on the facts as to whether or not they didn't apply the chemicals for what length of time, on how many occasions, as to how much it would obliterate, and how much would be left there, whether or not the camera would pick it up?

Mr. MURANE: That is objected to as irrelevant and immaterial and calling for an expert opinion upon a matter upon which the witness has not qualified.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

309 Redirect examination.

(Questions by Mr. GILMORE:)

Q. Mr. Fink presented this photograph to you and told you it was taken in June. Examine that and state what the words in the background back of the one-half appear to be to you. Do they appear to be the same as in your enlarged photo?

A. They appear to be the same, yes.

Q. Do you see any particular change other than the space where this supposed line is, that Mr. Fink speaks of observing?

A. I don't know that is the only change I would notice.

The WITNESS (continuing: In my opinion, so far as you can observe the writing in the background that is shown here, it is the same in each; the same taken in June and the same taken last week. Looking at the original Exhibit heretofore offered (Exhibit 1) it shows that acids were applied to the certain figures as shown in the discolored portion there. I don't see where the acid was applied twice to the portion in the parenthesis there. I didn't notice anything in the negative. Looking closely at the negative, it does not appear to me that any acid was applied to the figures within the parenthesis ($\frac{1}{2}$). The discoloration is very close up to the parenthesis. I don't know if there is any within it or not. I don't know whether or not if acid had been applied to this portion as long as it had applied to the figures within the parenthesis, a person would use as much acid there as he would in erasing the words "one-half" outside of the parenthesis. I don't claim to be an expert on the question of using acids at all.

310

Recross-examination.

(Questions by Mr. COCHRAN:)

The WITNESS (continuing): I did not say acids had not been applied to the parenthesis. I said acids may have been applied to

the figures and not to the parenthesis. I said it might be but it was very close up. (Paper handed witness.)

Q. Now, just examine that and see if you can tell me where the word "one-quarter" has been partially obliterated?

Mr. GILMORE: We object to this as not proper cross-examination.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them then and there excepted, which exceptions were allowed by the Court.

Mr. GILMORE: We object to the use of these acids before the jury; we have not introduced Mr. Harrison as an expert on this matter, and the testimony is throughout the whole case, that this instrument has been altered by the use of acids, and I don't know what is to be gained by this sort of exhibition before the jury.

The COURT: We sustain the objection; the witness has not testified he has any knowledge of the effects of acids, he has disclaimed in fact that he is an expert in the use of acids and therefore his testimony is incompetent upon this subject.

311 To which ruling of the Court the defendants, and each of them then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I don't know anything about the use of acids. I don't know that they use oxalic acid, but I think they do. I know that oxalic acid is one of the substances that will remove ink stains.

Q. Now, I will submit to you these two bottles, according to directions this one would be No. 2 and this one No. 1?

A. Yes.

Mr. GILMORE: We object to this as wholly immaterial and improper.

The COURT: Objection sustained, the directions speak for themselves.

To which ruling of the Court the defendants, and each of them then and there excepted, which exceptions were allowed by the Court.

Q. Now, what would be, if you know, the acid, or fluid for the purpose of removing ink stains?

Mr. GILMORE: Objected to as wholly irrelevant. What would be the ingredients in the fluid for removing ink stains or what the ingredient of this fluid is, is wholly irrelevant, and the witness has also not shown himself to be a chemist.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

312 Q. Now, why did you tell the jury that you didn't think acids had been applied to the parenthesis *are* on the original deed.

Answer. Well, I didn't say that it had not been, but that it ap-

peared to me as though it might not have been or it might have been less.

Q. Why does it appear to you as though it had not been applied there?

A. Because of the yellow stain.

Q. Does oxalic acid discolor?

A. Well, the acid evidently discolored it here.

Q. Then the acid discoloration has made this shadow in the paper?

Mr. GILMORE: Objected to as argumentive.

The COURT: Objection overruled. I don't think we need prosecute this examination any further because we have gotten about all the knowledge and information we can from this witness; he is not an expert on the use of acids, and therefore there is not any use to further proceed with this.

Mr. COCHRAN: I move to strike the testimony of this witness from the record. He has testified as an expert photographer and familiar with the use of chemicals used by photographers, and his opinion as to whether or not acids or chemicals have been applied in this case are no better than anybody else's, because he has not knowledge whatsoever on the subject and has never made any study as to the use of them, and has only testified that it does not necessarily follow that acids always discolor.

313 The COURT: Motion overruled.

To which ruling of the Court the defendants then and there, and each of them, excepted, which exceptions were allowed by the Court.

Whereupon the witness was excused.

And thereupon Mrs. M. E. HINMAN, a witness produced on behalf of the plaintiff, in rebuttal, having been duly sworn, testified as follows:

(Questions by Mr. GILMORE:)

The WITNESS: My name is M. E. Hinman. I am a photographer by occupation. I am employed at the present time by B. B. Dobbs; in Dobbs' studio. My part of the work there is printing; printing from negatives. I have had about three years and a half experience. I have been with Dobbs' studio one year the 9th of last July. I have met Dr. Chambers, the plaintiff in this lawsuit here. I remember meeting him in the month of July last year. I have seen Mr. Dobbs' photograph writings. I have seen those portions of Plaintiff's Exhibit Number 1 that I have changed here. I saw this instrument at the time it was in Mr. Dobbs' studio. I assisted in photographing it. I printed copies of this from the negative. I made them from the original negative of that paper. The negative from this paper was taken, I think, in June, during the past summer, I couldn't say the exact date; in June, I think. Examining this instrument where the discoloration appears, as to whether or not there is any perceptible change now, any noticeable change now in that instrument from

the time I saw it in June, at that part of the instrument
 314 where the words "one-half" appear, and the figures " $\frac{1}{2}$ "
 appear. I cannot see that there is any change in it now; no.
 I didn't notice any change. (Paper handed witness.) Examining
 the paper which you hand me, I would state that that is an enlarged
 print from the negative which Mr. Dobbs made of that part of the
 paper there; from the negative that we have there. That is a true and
 correct print, enlarged print, from the negative which Mr. Dobbs
 made of this instrument. I did not develop it or assist in its devel-
 opment, but I saw Mr. Dobbs develop it or assist in its develop-
 ment, but I saw Mr. Dobbs develop it.

Mr. GILMORE: I offer now in evidence Plaintiff's Exhibit No. 15.

Mr. COCHRAN: We make the same objection that we made to the
 introduction of the other photograph, that it is irrelevant, in-
 competent, and immaterial because the writing itself is already in
 evidence and speaks for itself.

The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them,
 then and there excepted, which exceptions were allowed by the Court.

Whereupon the paper referred to was received in evidence marked
 Plaintiff's Exhibit No. 15, and exhibited to the jury; this being the
 same paper which was introduced in evidence on the part of the
 defendants, and marked Defendants' Exhibit "K."

The WITNESS (continuing): In photographing a color similar to
 this discoloration here, upon Plaintiff's Exhibit No. 1, it
 315 generally takes a yellow; it does not take clear whict.
 Something like this blotch here (indicating). From my
 experience in photography. I am able to state that an enlarged
 photograph will exhibit writing partly defaced, or altered or erased;
 if there is any there at all it will bring it out.

Q. Now, just examine this place here on this photograph, under
 the words "one-half" (Exhibit No. 15); state to the jury what you
 are able to see there, if anything.

Mr. COCHRAN: That is objected to as incompetent, irrelevant and
 immaterial; the photograph speaks for itself, and this witness' testi-
 mony in regard to what is to be seen upon the face of the photo-
 graph is of no more value than that of the jury or any other person.
 What this witness is able to see is not the question; what is there that
 the jury or anybody else can see—one person can read what is there
 as well as another.

The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them,
 then and there excepted, which exceptions were allowed by the
 Court.

Question. What are you able to see—are you able to read any
 word or words under the words "one-half," on this portion of this
 photograph here?

Answer. Well, there is no word in full, that I can see.

Question. What do you make out, if anything, upon the instrument under the word "one-half"?

316 Answer. Well, I think you can plainly see a part of a "t", part of an "h," and two "e's"; the two "e's" are very plain.

The WITNESS (continuing): There are other letters that I am able to decipher on there; there are several marks. Examining the same words, the same portion of this instrument, "one-half," I can see something there that is partly erased, but I can't say what it is. I cannot distinguish any difference in the handwriting upon one photograph from the other; only that this is larger—there is a special paper which brings that defect out in this. I do not know what scale this photograph is. I say that that is a different kind of paper. This is a special paper which brings out defects. I don't know what scale that is in comparison with this. You are a better judge of those things than I am; I don't know what the scale would be.

Question. Now, from an examination of both of these photographs, are you able to state that there is no difference exhibited in the lines partially erased?

Mr. COCHRAN: Objected to as wholly irrelevant, incompetent and immaterial, because the instruments speak for themselves.

The COURT: Overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. Now just compare the two, Mrs. Hinman.

317 Mr. COCHRAN: Same objections

The COURT: Objections overruled.

To which ruling of the Court the defendants then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I don't see any difference in them excepting that the discoloration is a little plainer on this one, the larger one; I don't see any difference in the lines.

Cross-examination.

(Questions by Mr. COCHRAN.)

The WITNESS (continuing): Yellow takes dark; there are several other colors that take dark. A light blue takes white. Almost any light blue will take white on our negatives. I handle no negatives at all. I don't believe that photographing in colors is done anywhere. I do not know of any process in photography where photographing is done in colors. All the photographing which I have done is simply in white and black. White on the object turns the negative dark, and dark white; any very dark object does. Dark does not make the impression that the light does. I do not do any developing work up here myself. The developer does not eat the film any; it brings out the traces. The developing simply brings out anything that there is traced upon the negative. It is dark in the negative

wherever light is displayed to the negative. Anything that is exposed to the negative has the effect on the negative to come out dark where there is a white background. The spaces here on this
318 white portion of the deed, made a dark imprint upon the negative. Then when it is transferred to the paper it brings it back. Brings it back to the original. Every mark that is exposed to the negative. Any object taken in a photograph will not make its imprint upon the negative, merely does the background and puts the object into the space upon the background, according to the color of the object, and brings it out in the print, dark or light, but will not show an object in color. The coloring in the ink is light upon the negative, because it is dark in the deed itself. If they had been dark red, they would have been the same way. Any color that I know anything about would leave an impression, will take white and will simply stand out in the photograph. If there was a red blotch, where it is discolored yellow here, it would leave a darker blotch than that upon the print. I do not know anything about the action of acids. I don't know anything about the use and action of oxalic acid. I know they use acids in photography, but that is about all I know about it.

Thereupon the witness was excused.

Whereupon Mr. W. L. COLLIER witness produced on behalf of the plaintiff in rebuttal, being duly sworn, testified as follows:

(Questions by Mr. GILMORE.)

The WITNESS: My name is W. L. Collier; I am the manager of the Miners & Merchants Bank. I have been a banker since 1894. I was first employed in the Seattle Savings Bank, from '94 to '96; and from that in the Scandinavian-American Bank of Seattle
319 until last year, when I came to Nome. I was with the Scandinavian-American Bank in Seattle from 1896 until last September, when I came here, since when I have been the manager of the Miners & Merchants Bank of Nome here. As to the experience I have had in deciphering writings, or examining writings, I have held the position of paying teller outside in the Scandinavian-American from 1900 until the summer of 1905, and examined the different writings upon the different papers presented for payment every day. When I was paying teller in the Scandinavian-American Bank at Seattle, when any question came up over deciphering a signature to a check drawn through that institution, it was "put up" to me and I was held responsible; I had to pass upon everything myself; everything came up to me. During the time as I have related that I was employed where I examined writings, I made a special study of the subject of writing. I have been very much interested in handwriting, and after I found out that there were books written upon the subject, I posted myself by a study of the different authors upon the subject, and one of the men in our bank used often to call my attention and also different parties, that they would pick up any book upon the subject, that gave different views upon the subject, and in that way I found out

something that I never realized before, and I have studied along those lines to a considerable extent. I have been responsible for a great many millions of dollars' worth of checks in my time

320 and I think I am well enough posted to pass upon writings.

The position of teller's clerk is a position that I occupied prior to my occupying the position of teller and there were all the way from five hundred to fifteen hundred or two thousand checks which had to be passed upon by me every day in the clearing-house. To be acted upon, to be passed upon in the clearing-house and were passed up to me to determine the validity of the checks. All the checks that were presented for payment at the bank were handled by myself daily. Every check that came through the clearing-house I had to attend to whether or not they were genuine, that came through our bank. All checks that came through the bank with which I was connected were passed upon by me exclusively, and in the bank no checks were accepted and paid except it has passed through my hands, and I was the only one who was held responsible as to whether or not they were genuine; they all were passed upon by some one, and while I held the position of paying teller, were passed upon by me. I know the plaintiff in this action, Dr. Chambers. I have known him since 1905, but not very well. I knew him in Seattle before coming up here. And I have also known him ever since he has been here since last September. (Paper handed witness.) I have seen before, Plaintiff's Exhibit No. 1, which you now hand me. The first time that I ever saw it was last fall possibly November or December, I don't know just the exact date.

321 Dr. Chambers exhibited it to me then. With reference to this portion of the instrument where it shows the discoloration, the words "one-half," and the figures " $\frac{1}{2}$ " I examined it last fall for Dr. Chambers; he came in and we talked the matter over; he wanted my opinion on it, and I looked at it then very carefully; I do not believe that there has been any alteration in it since. I examined it again today before coming into court. There has been no perceptible change in it since I examined it last fall, except there may possibly be a change in the shade of the discoloration. The reason I say there could not possibly be any change in the writing since I saw it last fall is, the words "one-half" has been written in there after the other erasure has been made; it was taken out with acids, and if any other alteration was made it would affect the writing in there at the present time; it could not have been done, the color would have been different and these acids would affect the paper, as an alteration or removal of any kind would have to be made with acids. An alteration or removal would have showed in there.

Question. Now, I also hand you a paper marked Defendant's Exhibit "B," an instrument which it is admitted in the evidence to be in the same handwriting as the one I have before shown you, written in the same day, on the same day with the exception of the words that I have called your attention to, just examine the writing please.

Answer. Yes, sir.

322 Q. I also hand you another exhibit; just examine that one, being Defendants' Exhibit "A." It is admitted also in the

evidence here that that was in the same handwriting, written in June, 1906, June 30, 1900, almost two years prior. Just examine this instrument also before I ask you another question. Now, I also hand you another instrument, a letter marked Plaintiff's Exhibit No. 5, which is also admitted to be in the same handwriting as the instrument now before you. Examine them all, please. Now, I also hand you a photograph, enlarged approximately three times, on a scale of three times, marked Defendants' Exhibit "K," and Plaintiff's Exhibit No. 15, being a photograph, or purporting to be a photograph of the original instrument exhibited to you, Plaintiff's Exhibit No. 1? A. Yes, sir.

Q. Examine this photograph also.

A. I also exhibit to you a photograph, purporting to be a photograph of a portion of the original Exhibit No. 1, of that portion surrounding the discoloration, a photograph alleged to be about on a scale of one to six times in the enlargement, being marked Defendants' Exhibit "L," and Plaintiff's Exhibit No. 14, and I ask you to examine them all with reference to the handwriting.

A. That is all, I guess, I care to see.

Q. Now, from that examination Mr. Collier, as an expert on handwriting, are you able to state whether or not in your opinion the words "one-half" and the figures " $\frac{1}{2}$ " shown upon Plaintiff's Exhibit No. 1, were written by the same party who wrote the
323 rest of the body of the instrument and the other instruments exhibited to you?

A. There is no doubt in my mind but that that was written by the party who wrote out the original deed, or whatever it may be, the original instrument, bill of sale, or whatever it is.

Q. Also by the same party who wrote the second exhibit passed to you being Defendants' Exhibit "B"? A. That is in the same hand.

Q. And also by the same party who wrote the Exhibit marked Defendants' Exhibit "A"?

A. Yes, sir.

Q. Now, Mr. Collier, will you please take the photo marked Exhibit "L" for the defendants and Exhibit No. 14 for the plaintiff; examine that, please, Mr. Collier, and state whether or not you are able to decipher any words appearing back behind the words "one-half" as written in that instrument?

Mr. COCHRAN: That is objected to, if the Court please, as being irrelevant, incompetent and immaterial, because it is not necessary to have an expert pass upon that; that is a matter of eyesight, which any person as well as another can answer, and is ~~is~~ incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

A. I have examined this as well as the original deed under a glass and can see very clearly the word "three" under the
324 word "one" by the peculiar turn of the "t."

The WITNESS (continuing): The first word that I decipher

is the word "three." I find the "t" the first part of the letter "h"; then between the end of the "e" is "r"—no, the letter "r" is behind the "e"; the double "e"; follows. The letter "t" in the word "three" is a capital letter. The "r" is a small letter, the double "e" is small. I have examined Exhibit "A," on behalf of the defendants, and it is my opinion that the word "three" appearing in the background behind the word "one" in this Exhibit No. 1 was written by Mr. Whittren; the party who wrote out that portion of the photograph in front of me; the writing is identical.

Q. Now, Mr. Collier, are you able to take—are you able to draw out on this table here any similarity of the word that appears back of the word "one," showing the position with the same letters?

A. The "t" is identical with the first part of the "o"—right here—I don't know as I could make it any more identical. I don't pretend to be able to write like that.

Q. Now, will you show the jury on the exhibit which you have before you, being Defendants' Exhibit "E," any "T" similar to the one you deciphered on the deed Exhibit 1?

A. The first "T" there is identical with this first "T."

The WITNESS (continuing): I observe other points of similarity in the word "three" as outlined there with reference to Mr. 325 Whittren's handwriting in that agreement which is admitted to be his handwriting; his "e's" are the same; the "h" is just like the "h's" in this instrument in this document there, and also his "h's" in the word "Chambers" as it appears on there. The "h" is connected with the "t" right after the stroke and coupled with the same "s" stroke, in the same stroke; with the top stroke of the "t"; it also so appears on Exhibit "A"; there is the "h" and "t"; the "t" shown in the same way on Exhibit "A." I cannot write like anyone else; I would not be able to qualify on that. This "h" is quite considerably below the line in the original; this is the idea of it (illustrating). The "T" requires a long stroke, gentlemen, a longer stroke than what this is; the "one-half" now runs almost equal, includes the figures, the letters in the "Three" underneath it, but not quite. There is a double space between the base line. It looks on the paper here like a double space here—I don't know just what. It just comes down about one-third the distance between the lines; about one-third the distance down below the base line; the top of the "T" is about halfway above the space line; the top part of the "T" joined the "h" practically on the same line above where the top of the "h" joined the "T"; the bottom of the "h" is right with the base line; the letter "r" is right on the base line; the letters "ee" are both on the base line; the letter "q" descended below the base line; it is just right where it goes down to the body of the three; it looks to me as if there was a loop coming over into position 326 with the line at the bottom of the "ee's"; the letter "u" just adopts the base line. I can see the letter "a" there; it just reaches the base line. There is a letter beyond there which I presume was an "r," but I cannot say that because I cannot read anything more, but I can see a line running up; where I see the word "three" it appeared to be complete below the base line; it comes below the

word "three" somewhere near the "t," but it runs on a line according to this photograph, right along the whole word; it is rather below down here; where the "q" appears where this spot on the instrument is shown, it appears to follow the base line.

Q. At what portion? I will ask you if the letter 'q' as shown there—now, referring to the photograph in the parenthesis or brackets as shown in this original instrument, examine the original, please, and state whether in your opinion the acid was applied to the brackets, or whether or not they have been erased?

A. Yes, sir, I think it was all erased.

Q. You think they have been erased?

A. That is my opinion.

Q. Are you able to decipher any word or words beyond the bracket in the background beyond the one-half in the photograph?

A. Right beyond here (indicating)?

Q. Are there any figures in your opinion discernable beyond the 1 in the $\frac{1}{2}$?

327 A. Well, beyond the "1," from the photograph. I can't make it out; I have not examined it under a glass, and I cannot make it out from the photographs.

The WITNESS (continuing): I have examined the original instrument, Exhibit 1 under the glass; I was able to make it out plainly, quite plainly; I made out a figure 3; that is, I could make out the outline of it, and in my opinion it was a 3.

Q. Now, referring again to Defendants' Exhibit "A," the agreement that was exhibited to you, and also to the two deeds, and see if you can call attention of the jury to anything in those writings that causes you to believe that the words "one-half" in those writings and the words "one-half" in this original deed, Exhibit 1, were written by the same party, taking the three instruments, and call their attention to anything in connection with the words "one-half" that convinces you that they were written by the same party: You may use both of these in calling attention to what you consider reasons to say that the same party wrote the instrument, wrote the words "one-half"?

A. Well, it is my opinion that it is all in the same writing; I don't take so much from the lot themselves as from the character.

Q. Please take the pointer and just call the attention of the jury to anything that you see that causes you to form that opinion, to anything that you see in the papers?

328 A. There is nothing there, Mr. Gilmore, that I can call the attention of the jury to further than the fact—I want them to notice the "u's"; the uniform way in which the "u" is written in them all. There is a letter there that is absolutely identical.

The WITNESS (continuing): There are a couple of "u's" in this writing (indicating) there which are very good. I do not think that all of the capitals used in writing are placed under the surface of the word "one"; there are a couple of capital "O's" too, that are very good. In constructing this sentence where the words "onehalf" appear, I don't know whether the word "One" should begin with a capital or not; if I were starting a sentence such as this contained in

the conveying clause, I don't know if I would give a word in that place a capital letter or not; the facts are in regard to capitals, I am not very well up on capitals—I am not well enough versed in capitals, grammatically speaking; I couldn't qualify as an expert when it comes to the grammatical part of the thing; examining this instrument, and the reason that I think that the same party wrote that, I desire to call the attention to the jury to these "f's"; if you will note the way the loop comes back, it curves over, and the same thing is found there, there are other "f's" in the original instrument other than the two; this one here (indicating) in the word "following" in the original instrument; then the word "left," the letter "f" in that word on the Left Limit, that is about the same; these "f's" I have pointed our compare very favorably with the letter "f" in the word "half" in shape. They compare with each other.

Cross-examination:

The WITNESS (continuing): I am the manager of the Miners & Merchants Bank; I know the plaintiff Dr. Chambers; he does not owe me any money; he does not owe the bank any money; he don't owe us any money; we have not a mortgage in the bank upon his interest in the ground, if he wins this lawsuit; none whatever; neither myself or the bank ever advanced him a dollar—I don't know whether Mr. Cowden has in the last few days; I think that there has nothing come to my attention; if there has been any money advanced; I couldn't say whether Dr. Chambers owes the bank anything at this time; if he does I don't believe that it exceeds a hundred dollars, if it exceeds that. Dr. Chambers spoke to me a short time ago and said he possibly might need a little money. I do not know whether he owes the bank of which I am the manager anything or not, but I can easily find out; it might be possible that he owes us a hundred dollars or so; I have never been a cashier in a bank; I was assistant cashier in the Scandinavian-American Bank in Seattle; I was constantly passing upon signatures to checks; a person has usually a rather set signature; so that there is usually great similarity in their signatures so that you could readily determine ordinarily a person's signature, and whether it is genuine or not, easier than you can where a man is writing consecutively; as a general rule, men who are in the habit of writing checks, for the very purpose of having no mistakes in their signatures, try to make their signatures always uniform or about the same, and because they can't write any other way too, is one reason; as a general rule, it is a fact that business men who are in the habit of signing checks try to make their signatures always the same, for the reason of avoiding any mistake in their signatures. Business men usually write their signatures the same; they do that to try to prevent forgery of their signatures; that is not true of the general writing of a person, but I will tell you that if a man has a certain writing, he won't change that writing very much as a general rule. Some men will write the same all the time in general writing and some will not; men will not write in general writing with the same degree of care or accuracy, but again the

same character, it looks the same but perhaps not so accurate in general. I do not always make my letters the same in my ordinary general writing. I don't know as I can say as to others; sometimes I will write quite small; sometimes I will write large spreading my letters apart, and sometime I will crowd my letters clower together; but there is usually the same characteristics; I write sometimes this way (illustrating) and sometimes that (illustrating). I generally write rather closely; when I try to write closely I write my letters one close up with another, and sometimes I will write a whole sentence with the letters farther away, different in their manner of closeness and different in one way and another; yes, perhaps I will write a

whole sentence which differ exceedingly from my ordinary
 331 manner of writing. I don't think that would apply to my signature; in general, the way a letter is formed, that form is usually followed in all a person's writing; when it gets down to writing signatures, that is not what I have reference to at all; it is not because I do not know anything about a person's ordinary handwriting that I do not answer the question; that is not the whole reason. It is altogether the way you examine a handwriting, how you look at it; I don't know that I would know how to examine writing in that connection at all. I do know how to examine signatures.

Question. Now, don't you know that when it comes to writing, common writing, right along in letters or deeds or ordinary matters of that kind, you don't know how to compare them, that they do not compare at all with a person's writing which he adopts in writing his signature, they are not written similarly at all?

Answer. No, I don't think so, Mr. Cochran. I don't wholly agree with you there; it takes time to learn to compare handwriting.

The WITNESS (continuing): I think that I know handwriting myself. I think I learned it in my experience which I have narrated; it takes very careful attention; it takes lots of experience to learn to compare handwritings. The general appearance of the handwriting of one person differs greatly from the general appearance of the handwriting of another; without any great experience to detect the difference and that is true of every letter; the science
 332 of handwriting is just the science of comparing letters and character in writing; as I told you, in writing it takes time to learn those things; in my opinion life don't run quite as easily and evenly as that; I say that some people would not see any similarity in this and would not compare them at all, because they would not detect for instance, that it all does not come down to the base line while I see that in my experience in examining handwriting; some people would not see that it was the same kind of work because this letter does not come down to the base line, like that one does (illustrating). I don't know how long it would take a person to learn and observe that fact; it might take them a week or a day or they might be able to observe that at a glance, because they might not have had any specific training. I don't know how long it took me to observe that fact; it didn't take me very long. I took in at a glance the similarity of every letter there. I took in at a glance that this letter while it didn't come down below the base line

was very similar to the same letter in the other writing. Anybody could do that. It does not require any particular skill to observe that. I don't pose as an expert—well, I will say on signatures; I will, all right; I am an expert on signatures rather than on writing. I did not mention the brackets in the original deed. Plaintiff's Exhibit No. 1. I did not mention the brackets, to my knowledge; the only thing I was asked about was the words within the brackets, the words "one-half." If I stated that in my opinion then that the

brackets had been erased, I had reference to the figures included in the brackets; I mean that the brackets had not been erased. I was also misunderstood, or I misunderstood

Mr. Gilmore when I stated that in my opinion the brackets had also been treated; it is my opinion that the brackets have not been altered any. I say that they have not because I cannot see that they show any mark. The acid seems to have run over onto the first bracket, but it does not show that it has ever been altered. The first bracket does not show that it has ever been altered, because there is nothing there to indicate that it has; there would be if they had ever been erased; there would be a stain; that acid erasing compound leaves a stain, as a general rule. I don't know what properties there are in the acid that leaves a stain. No, I would not define what any of the qualities of the erasing fluid are. I know that some acids leave a yellow stain, because I have seen lots of instruments—well, not lots of instruments, but I have seen several instruments where things have been erased. I have seen an ink erasing fluid applied. I will qualify that; I don't know that I have ever seen it applied; I have seen its action afterward. I know that acid leaves a yellow stain because I have used it; I have used Sanford's eraser the same that you have there. I don't know what acid in the eraser leaves the stain; some erasers might not.

Mr. GILMORE: Objected to as incompetent and immaterial; it is not shown yet what ink eraser was used in this instance, and we object to the use of these chemicals before the jury.

334 Mr. COCHRAN: I am going to demonstrate to the jury that this eraser don't leave a yellow stain. I have a right to demonstrate by using this eraser right here before the jury that it is not the acid leaves the yellow stain; that the acid dissolves the ink and that it is the application of an alkali that takes up the stain and leaves no stain.

Mr. GILMORE: Objected to as incompetent, irrelevant and immaterial.

The COURT: It may have been another acid, another preparation that was used by this other party; this does not purport to be the same preparation even; it might bear Sanford's name and yet be an entirely different preparation. There is no presumption about this being the same, and the kind of preparation has not been sufficiently established to make this testimony admissible in the opinion of the Court. Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. Are there two different fluids in Sanford's ink eraser?

Mr. GILMORE: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination. The witness has not qualified as an expert on chemistry.

The COURT: I do not think he has qualified sufficiently as yet to testify upon this subject. Objection sustained.

35 To which ruling of the Court the defendants, and each of them, excepted, which exceptions were allowed by the Court.

Question. Don't you know that it is oxalic acid, which is the principal acid used in removing ink stains?

Answer. I am not a chemist—I don't profess to be.

The WITNESS (continuing): I don't know what kinds of acids are used; I am not very familiar with alkalis. I have never used any acid. I have used the common ink eraser, and I don't believe that I have ever seen any instrument where an eraser had been used that did not show a discoloration, and it is my opinion that an acid is used; in the course of time it will fade, but it is my opinion that it leaves a stain because I have noticed it, I believe. In any that I have noticed at all, I have noticed a like discoloration or stain. When the application is first made, that is any application that I have seen when the ink starts to run across the paper; then this second application removes the effect of the first one, and even that will run across in course of time.

Question. That effect is simply the effect upon that piece of paper which I have shown you, is it not?

Mr. GILMORE: Objected to for the reasons heretofore stated to your Honor. That this witness has not been offered as an expert upon the effects of acids or anything else upon instruments, and does not profess to know anything about them, and is not an authority upon the action of ink erasers upon paper writings. Further, 336 if they want an authority upon the action of ink erasers upon this particular instrument, the person in whose handwriting the whole instrument now appears is the proper person to call. Let them call Mr. Whittren who, the testimony shows, knows all about the action of this ink eraser upon his particular paper, but they have no right to exhibit it to our witness, who was offered here simply for the one purpose of giving his opinion upon handwriting in this deed—these gentlemen have no right to expect our witness to testify in regard to matters which have been excluded by the Court, make experiments here before the jury and expect our witness to pass upon them.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

337 Cross-examination of the witness COLLIER continued.

(Questions by Mr. FINK):

The WITNESS (continuing): To the best of my opinion I am qualified as an expert on handwriting, as an expert within the

meaning of the word, as one who can compare one handwriting with another with reference to the formation of the letters, slants, characteristics and so forth; also with a view to determining whether a forgery has been committed. My experience in handwriting has been mostly that of signatures. I have never given any study to handwriting with a view to determining whether or not forgeries had been committed, nothing more than to see—that is to say, nothing in particular with that particular view in mind. I have never given any particular study to it in that light. I have studied the subject of handwriting, more or less in all its branches, but not in connection with that particular subject, any more than it was considered in the general subject of handwriting. I have read authorities upon that subject in connection with the study of handwriting; nothing more, however, than in the usual line of business; I have never made any study except in connection with what I had to do in the usual line of my business. It may — that forgeries can be successfully committed, but there has also been differences of opinion between the experts. It is a fact that forgeries can be so successfully committed that the very best experts on handwriting will differ materially from each other on the subject.

338 one-half certain, in their expert opinion, that a forgery has been committed, and the other half equally certain that there has not. In relation to the word "one" on the larger photograph, that being the one marked Plaintiff's Exhibit No. 14, and Defendants' Exhibit "L," on that there might possibly be a difference of expert opinion as to whether or not that was written by the same person who wrote the body of the instrument, I don't know just what they would do. Assuming, for the purpose of this cross-examination, that the word "one-half" written there was not written by the person who wrote the balance there of this Exhibit "L," looking at it from that standpoint, there might be a difference of opinion, as I stated in this, but looking at them you can take one view or the other, while one person would say this was a forgery or not, but, as I said, Mr. Fink—one of the rules in determining the identity of handwriting, and one of the principal ones, is the slant of the letter; the slant of the word, and another is the spacing between words, and possibly another is the distance from a letter, a certain portion of a letter above or below the base line; it is one of the established rules to ascertain whether or not handwritings are identical; one of the chief rules. There is also the pressure with which the pen is placed upon the paper in writing; it would depend entirely upon the formation of the letter whether it was an important thing in determining the identity of handwriting where a forgery is claimed, because that can be imitated. It is true that is the

339 very thing that the imitator is doing is to imitate the letter; so that you have to look at all those other things, a person who is an expert handwriter, or an expert on handwriting. It is true while the person who is committing the forgery would look to the formation of the letter itself, and a person who is an expert in detecting forgeries would look at all of the things which you have just covered in your questions to me. Taking the question of slant,

first, it appears to me here that the slant of the letters in the word "one-half" in the original instrument is the same slant as the rest of the letters in the rest of the handwriting; I have not made any measurements. Now, the slant of the letters in the words "one-half," and the slant of the letters in the words following, for instance in these "h's," the slants are very good other than the "h's," does not slant hardly enough as it appears in the words "one-half." It does not in the word following. Looking at the slant in the letters of the word following, taking the "f" in the word following, it is not as great but very similar, but not as great; the "f" in the word "following" is not as great as it is in the word "half," but it is a very similar slant. In the letter "o" in the word "one." I notice that the last downward stroke of the "o" comes to the base line, while in this "following" it is very perceptibly above the base line, but that don't make any difference. I don't see why that is

one of the things to be considered. It is one of the rules to
 340 be considered, certainly. Understand me, I will tell you; suppose that you are writing out an instrument and you make an erasure and you go to write something else in there; you remember that when you come to write in there you can't write the same, when you come to write in a limited space—you won't at any rate, write the same, and it is not done, as a general rule, in writing in, filling in an erasure, the same as you wrote in writing out the instrument as a whole; that can't be done as a general rule. The general characteristics of the hand will be the same but he don't write the same; we understand, however, that the general characteristics will be the same; the distance each letter is from the next letter, its respective position with reference to the base line, will not necessarily be the same; I mean by the base line, this line here (indicating). Take the letter "n"; it is a fact that in this "n" (indicating) the "n" is formed by a very slight pressure of the pen until this part of the "n" is reached, then there is a heavy downstroke, then an acute angle made with the pen up; the only place where you come to this downstroke is where there is a sharp spacing at the bottom, which is rather jammed—run together there, as you notice. It is not a fact that I am becoming an advocate rather than an expert in this case; you asked me a question and I am trying to give you my reasons for my answers. This "n" is formed very much the same *with the same* with the same stroke as that one; it is a fact that in forming this "n" there was a sharp downward stroke. If in this other letter "n" it

341 was done by making that stroke up like, making a curve, a slight curve, like that, that would have to be determined by the space. I see there is a curve. I want to call your attention to the "n" when it comes down here to the down stroke, it makes a start up again with the curve, but that might be an indication that the pen comes right up again here (indicating); it is possibly carried across there, just a little blur of the ink (indicating). It is just possible, to my mind, that this "n" shows the same start back, with the same kind of a stroke, with the same sharp stroke of the pen as was made up there. The "h" in *h* and the "ha" in "half"

are similar, to my mind, by the principal way they are here; the loop is very similar in the "h" up above here. The "h" above there has a great similarity to this "h" here (indicating). The characteristics of the formation of the "h" in that "him"—in the first place, that loop here, instead of coming around the "h" in an in-stroke, rather, here. The characteristic which I consider distinguishes that "h" from anything else in the instrument is in making the loop there is a similarity for one thing; there is a little irregularity down here in the upward "h." I consider the characteristic that this part of the "h" is made just like that stroke of the "h." I have looked at this "h" over here too. It shows it was made the same way as that "he." I say that this "h" is made the same way as this one here in "bench"; as between that one and this one

342 in "half"; this one is curved instead of an angle. That is one of the main characteristics, and yet in this "h" in bench, and the "h" in half, one is curved and one has an acute angle.

Now, taking the letter "a" in the word "half"; there is also an "a" there (indicating). The slant in the "a" in "half" is practically the same as the "a" in "place." Its comparison with the "a" in same is not so good. I think the angle there is too short. It is just the same as in here. It compares with the slant in "as" all right; so that the slant of the "a's" compare favorably with two and unfavorably with one. Taking the slant of the letter "a" in half, it is practically the same kind of an "a" as it is there; there is a loop right here where it is practically vertical along in here—that is all—it is not the same. It is not the same as in the word "same," however; there is an indistinct loop in that; there is an indistinct loop that becomes greater in this stroke here. The letter "l" is very much the same all over. It is about the easiest letter there is to imitate. I would say it is the easiest letter in the alphabet to make properly; I don't know about anyone else. The only way I could determine the letter "l" would be in the slant and particularly in the shading. The slant in this "l" is not hardly as great as in this one. The slant of the "f" is not as great as the slant of the "f" there. I am not familiar with the use of these chemicals. I have used them. I do know that the chemical can be applied to an ink that you desire to be erased a sufficient length of time to partially erase it. If a person was of a mind to do so, he could erase entirely what was originally written in, so that you could not see any traces

343 of it at all. He might have written the words "three-quarters" in there; then he could erase that, just leaving a faint trace, so that when photographed an expert might hold it in a way that would show traces there of the "three-quarters." I believe that could be done easily if the paper would hold up, which I suppose it would. Of the word "quarter," I see there "Q u a r." I think I can see very plainly, "q u a r" is about all I can see there; that brings me to right here (indicating). There is "q u a." You see the "u" is here down here in this shape; then coming down there is a loop; now you notice the "u" there. This is an "n," "u" takes up about the same space as an "n," "u" there would be about that shape, half an inch, allowing for the loop of the "quarter" coming back so

that the letter up there would be about the bottom of the "l," just about; that would throw the letter "u" about to the bottom of the "l"; it would throw the "r" away over there (illustrating on Exhibit "L"). I didn't think that that would throw the "t e r" into this bracket. I don't think it would be necessary to write with your "q u"—the "q u" there is very similar; it is practically the same size, or looks to be; however; I don't think it makes much difference about the size. There is a very slight difference in there, if there is any at all. I don't think that would have any bearing at all on a theory of that kind.

Question. You say that you don't think that would have any bearing upon that question in determining whether or not the
 344 word "one-quarter" was ever written there, bearing upon which portion this was written?

Answer. As far as I can see there, it looks as if this portion was written out; I don't know whether it was or not—now, you take the word "following" there. You will notice where it comes along there, the "f" and the "o" what a difference there is in the length of the stroke.

The WITNESS (continuing): That is the way that people often write. Now you come along to the word "described"; it is all bunched up. It would be considered a very great characteristic in a man's writing the way the capital "T" is joined to the "h" as shown there. I only know of one other person that makes that connection as closely as it comes in there. That is all that I can just recall at the present time; I know of but one man who writes in that particular way in connecting the "t" and the "h." It is peculiar. It would be very characteristic of a man's handwriting. It is possible that if a man wanted to imitate the handwriting of another, the first thing he would light on would be that he would imitate the "th" as it is there. Referring to Exhibit "K," I can see what I imagine is one line below the "one" there, the outer line. I don't think that is a line; I think that is the outer line of the acid. There might be a line there under the "one-half," but I don't believe it is a line. I see a line there directly under the letter "h." It looks like the continuation of the
 345 down stroke of a word there, but then again you notice how the acid comes right along there.

Question. I see that line; what I want you to say, is whether you see this additional line or not.

Answer. That has no connection with the letter above; it is my opinion; that line is an ink blot from and caused by the chemical; that is what I would think.

The WITNESS (continuing): Beginning with the lower part of the "f" in the word "half," and running down towards the last "e" in the word three; I can see a stroke there; that stroke is directly below the "f," the same as it is in the word "half," and runs into a part of the word "quarter"; that is very distinct. It don't look like any letter to me, it is away from—it covers a part of the half or two-thirds and is away from the other line too far. I can see that line there—I can't see anything here though—it don't look like anything or any portion of a letter. I have examined the manner in which Mr. Whittren makes a figure 2. As to the similarity between the

2 there and the way that Mr. Whittren makes a 2, for instance, the 2 below the bottom line, and the figure 2 at the bottom line; there is no similarity whatever, but you can see a stroke here in this one here (indicating) which I can make out in the "1/2." Whittren makes a 2 with a downward loop at the lower end, while this one is made with a straight upward shot.

346 Redirect examination.

(Questions by Mr. GILMORE:)

The WITNESS (continuing): Referring to the first blot along the top line in the same letter on the top line of Exhibit "L," there is the final stroke higher than the "n"; in this "e" it is higher. Going back to the word "one" again, that final "e" is higher in this top line than the letter "n," very much higher; taking the word "same," the final "e" is higher; in the word "place" it is higher; taking the word "one" in dispute, on this Exhibit "L," compared with this lower "e," that is higher, an eighth of an inch; it is practically the same with the other three words that I have mentioned. That is one characteristic used in determining the similarity of handwriting. That is what I meant when I told the jury that the general characteristics indicated that this was the same handwriting, that the same party wrote it. I told the jury yesterday that the words "three-quarters" or the parts of it which I was able to decipher, were written, in my opinion, by the same party who wrote the rest of the original deed. Mr. Fink's theory is that the original paper as Mr. Whittren wrote it, contained the words "one-quarter"; that Dr. Chambers, or some one in his behalf, wrote in a portion of the words "three-quarters," and afterwards wrote in "one-half." That this portion within the brackets was originally "one-quarter"; then that was erased and the words and figures "three-quarters" partially written in, that that was
347 subsequently erased partially, and "one-half" written in instead, so there would be that portion partially erased.

Question. Now, take the original deed, Mr. Collier, and state whether, from looking at it, or not, in your opinion, there was, from the condition of the deed itself, a double erasure with acids, or in any other way?

Mr. FINK: That is objected to as wholly irrelevant and immaterial, the witness not having qualified to give an opinion on that point, not claiming to be an expert on erasures, with chemical erasures or any other manner, having specially disclaimed that he was an expert upon that matter.

The COURT: He says he has seen writing erased.

Mr. FINK: Objected to, if your Honor please, that it is wholly irrelevant and immaterial, what he can see upon the instrument; the jury are as good judges of that as he is.

The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): In my opinion I don't believe there has been more than one erasure made there.

(Questions by the COURT:)

The WITNESS (continuing): I can't see any difference in the background, on the body of the paper there, back of the present word "one," or back of the words "one-half." I would like to examine with a glass, if there is one here. There has been an erasure there, Judge, but I can't see anything back of it. Right here in the background, on the ground back of the written words "one-half," the paper bears a different appearance; either there has been a great deal of acid applied back of the one and not so much along the other half. It is just the same in my estimation, after examining it.

(Questions by Mr. GILMORE:)

The WITNESS (continuing): That might be true if the words "one-half" were written in four years afterwards in the instrument, by the same man; it might be possible that that same man would be able with the same accuracy in handling the pen, or with the same pressure or the same ink, but I contend that a man's writing remains the same, the character of it. I mean the general character. With signatures there may be some differences in the writing, but the general chief characteristics of it remains the same. Assuming that it is made with the same pen.

And thereupon the witness was excused.

Whereupon Mr. FRANK H. THATCHER, a witness called on behalf of the plaintiff in rebuttal, and having been duly sworn, testified as follows:

(Questions by Mr. GILMORE:)

The WITNESS: My name is Frank H. Thatcher and I am the Cashier of the Alaska Bank. I have been with that bank as a cashier or assistant cashier for about six years. During that time I have been cashier or assistant cashier about five years; in my employment I have to pass upon signatures to checks that come into the bank.

Question. During the five years that you have occupied that position, Mr. Thatcher, have you passed upon a great many signatures and handwriting.

Mr. COCHRAN: That is objected to as irrelevant and immaterial.

The COURT: Overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Answer. I have.

The WITNESS (continuing): During my employment for the past six years, I have not had to make any comparisons of handwriting.

I did not make a study to any particular extent; no. I have given it some study.

Question. I will now hand you a paper, Mr. Thatcher, that is marked Plaintiff's Exhibit No. 1, and will state to you that the body of that deed is admitted to be in the handwriting of Mr. Whittren, with the exception of this "one-half," which he denies. Examine that. He denies the words "one-half" and the figures " $\frac{1}{2}$ " also. Also I hand you a document purporting to be a deed, marked Defendants' Exhibit "B," which is admitted to be in the handwriting in the body of the deed—all of that instrument is admitted to be in the handwriting of Mr. Whittren. I also ask you to examine that. Here also is a document which I now hand you marked Defendants' Exhibit "A," all of which is admitted to be in the handwriting of Mr. Whittren. Examine that, please. I also hand you Plaintiffs' Exhibit No. 5, which is a letter admitted to be in the handwriting of Mr. Whittren, written in 1906. The Exhibit No. 1, and Exhibit No. 2 and Exhibit "B," which I handed you, were admitted to be written all at the same time. I would like to have you examine them all. Now, you may also examine the photographs of the deed, being Plaintiff's Exhibits 14 and 15, and also marked Defendants' Exhibits "K" and "L"—you can leave them here upon the wall or you may take them in your hand. That is a photograph of a portion of this first exhibit I gave you, containing the disputed portion, or the disputed part of the erasure. Here is also Exhibit "K," which is a photograph of the entire deed, Plaintiff's Exhibit No. 1. Now, from the comparison you made of the handwriting, I will ask you whether or not the words "one-half" in writing on the Plaintiff's Exhibit No. 1, in whose handwriting are the words "one-half" in Plaintiff's Exhibit No. 1?

Mr. COCHRAN: You offer this witness as an expert?

Mr. MURANE: Yes, sir.

351 Mr. COCHRAN: We object on the grounds that the witness has not shown himself qualified to answer as an expert upon handwriting.

The COURT: Oh, yes, bankers, and men who have had experience in comparing handwriting and in judging of those things continually are experts sufficiently qualified to testify in matters of this kind. The degree of qualification is for the jury to judge, in judging what degree of credit they will give to a statement, of course. Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): In my opinion the "one-half" was written by the same party who wrote the rest of the deed, from a comparison of these different deeds and papers. Examining this photograph, Exhibit "L," I can decipher something back of the word "one." I can see there the word "three." I think that the word "three" is in the same handwriting that these other instruments are.

Cross-examination.

(Questions by Mr. COCHRAN:)

The WITNESS (continuing): In the last answer I stated that I was able to decipher a "three"; I think it is the same handwriting from the peculiarity of the capital "T"; I think that the "three" has been begun with a capital "T," a capital letter. The "h" looks very similar to the others here in regard—now compared to the "h"

352 in the same instrument in the word "him." There is a very heavy downward stroke here (indicating) and also in this one equally heavy. The downward stroke of the letter "h"

is heavy in this one, and at practically the same angle, or so appears to the eye. The first portion of it appears to have the same general curve as this one. The loop of that one there is not the same; they are dissimilar as to the loop. I have studied the art or science of writing to determine whether or not a certain writing was in a given person's handwriting as connected with my business about five years, here in Nome, as cashier and assistant cashier of the Alaska Bank. My experience has been confined principally to the examination of signatures to checks but not together. As to my experience in a great many instances we have had checks come in which were without signature, through carelessness or something of that sort, and we would have to determine who they belonged to either by the handwriting in the body of the check or by the deposit slips without any name, nobody's name either through carelessness or neglect, and in those cases the banker has to rely upon the rest of the writing in the slip or check to determine who they belonged to, without even the checks book's stubs or anything by which to enter them, and I have had to determine by the handwriting alone on the stub. From the handwriting on the stubs I have determined who the checks belonged to. We keep no record or account

353 of checks and the money paid them, only by the amount of it we have no number of the checks. If a check is dated the 1st day of June, the amount of it is a hundred dollars, taking the checks of that date, we might turn to the books and find out the maker of the check by running it down afterward, but the principal reason for comparing the writing was the easier; it would be easier to compare the writing so far as our purpose went, unless it was a very distinct hand which I recognized myself. I can't call to mind any one just at present whose stub-book I had to compare in order to know the maker of a check, but I have had a good many in the course of several years. I did not pass upon all of them personally, but some of them. I have made another comparison; I have taken checks presented. I have taken checks presented without a signature; I did not pay them; I would not pay checks without signature, but there have been checks credited to the individual presenting the check; there was one check that was presented that I have paid, that I can recall which I have paid, possibly the check would be credited up. I don't recall any forged checks that I have passed upon. I have had some experience in determining the handwriting where the checks were said to be forged; there have been one or two

instances in the two years that have come under my observation. I don't recall that we ever have paid a forged check. I have passed upon one forged check drawn upon our bank. I think it
354 was two years or so ago; it was not discovered by me. It simply came into my possession. I did not give my opinion on it in court; it did not come into court. I examined the signature and saw that a forgery had been committed. It was rather plain to me without making any specific examination. I am not well versed with reference to the science of determining handwriting, to identify the different handwritings; my knowledge comes principally from the experience I have had, how I would compare it myself. Where the writing is placed with reference to the base line is not one of my rules for the examination of handwriting. I don't know the system in connection with the science of writing. Not to speak of it as authority on the subject; I do not know as an authority of the spacing between the letters and the words. One of the things I would look at in determining the similarity of handwriting would be the spaces between the letters, each of the letters, as they are placed. I could not say that that is a very material rule in determining the similarity of handwriting. The width of the letters certainly would be one of the rules. I stated before that I was not versed in the rules of the science, but it might be an important rule in determining the identity of handwriting whether the writer used acute angles or curves in making his letters. The rule I followed was the shape of the letters. In answering Mr. Murane that this
355 was the handwriting of Mr. Whittren I compared the shape of the letter; the size of them with reference to the other letters; one letter might be smaller than another; letters might be similar in size; or letters might be smaller in some words and relationship to each other; any peculiarity with reference to slants; there might be some peculiar slant of some particular letter; I don't know that I can think of all the things that I considered, but in general the similarity in appearance, the general appearance. I could not say that I go by the similarity in formation exclusively; there would be a great many things to consider. I have mentioned some of the other things I would go by other than the similarity of the letters. I referred to the size with reference to each other; the slant of them, the shape, the general characteristics were the ones I mostly called to mind. The distance above or below the base line might be a rule as compared with other letters. I don't know if that is an important rule in determining the identity of handwriting. My own method of forming my opinion is not based upon any scientific theory or anybody's system. I should think it might be another important rule in determining the identity of handwriting whether or not loops are used instead of angles. I have never studied any authority upon the science of handwriting. I do not recall passing upon a forgery but once; perhaps I have not seen the forgeries if there were others. In my ordinary course of business I have paid checks because of my familiarity with people's handwriting—I would detect the similarity from the number of
356 checks that passed, in determining where or who it belonged to, but under no question of forgery. My experience is with

comparing ordinary handwriting, in determining the ordinary handwriting of our customers, except that I have had some signatures that were written by customers under various conditions which make them vary somewhat and which require some comparison. If a person was designedly to change an instrument, I should think one of the first things he would study would be the formation of the letters which he was going to forge. I should judge that it would be his endeavor to form them with as much similarity as his skill would permit. I think perhaps that it would be so, that the general formation would be the same to assist in concealing the fact that a forgery had been committed. I think perhaps that would be the easiest thing for a forger to imitate. The expert handwriter might then look at those hidden defects or characteristics of handwriting other than to the general formation of the letters to determine in detecting the forgery. They might study the peculiarities or characteristics of the handwriting of an individual; I don't know; I don't know how they would go at it to study it. Taking the letters in the lower "one-half." The letter "o" in the lower one appearing at a point in the first line on Exhibit "L"; I see a similarity between that "o" and the letter "o" in the "one-half" appearing in the erased

portion, where erasures have been made. If a person was
357 going to forge this "o" upon this instrument, I should think they would study the formation of the "o." It is similar to this "o." I cannot say whether the letter "o" is an easy letter to imitate or not; I have not had any experience in that line. I can't say whether it is a very easy letter to imitate or not. I observed that the "o" in the lower "one" on the first line of Exhibit "L," and noted this part of the "o" (indicating) in comparison with the letter "m," extended down flush with the base line. I note that this "o" here (indicating) rises considerably above the base line, so that there is a dissimilarity of that character between the two letters. An expert on handwriting would look and note the existence of the characteristic of that kind in an individual's handwriting to determine whether or not a forgery had been committed; that would be one of the things to be considered. In that respect there is some dissimilarity between the letters "o." Take the following letter "n." I note in this letter "n," the "n" in the first "one," on the first line, that *it made* with the angles acute at the lower end. I notice that—sharp acute angles, while in the lower one in the portion of the instrument erased, the lower parts of the letter "n" are by curves. In that regard I do not think those letters are dissimilar. I think those letters are similar; well, one of them is with an acute angle and the other is not; in that respect they are dissimilar, in that particular regard. I think an expert would take that as one point of dissimilarity between those two letters. Taking the letter "h" in the
358 word "half," and comparing it with the letter "h" in the word "him" in the third line, the letter "h" in the word "him" begins much farther above the base line than the letter "h" in the word "half." It extends upward and comes down without a loop. The letter "h" in the word "half" has a very marked loop.

I notice that the letter "h" in the lower portion has an acute angle, and the lower part extends below the base line. I observe that it extends upward on an acute angle very perceptible, while this "h" in the word "half" extends only to the base line and extends upward with a curve. With reference to the starting-point in the word "half" and the starting point in the word "him," the starting point above the base line of the letter "h" is particularly dissimilar. That is one point upon which you would determine the identity of handwriting. In the loop it is also dissimilar, the loop in the upper one is scarcely as good; the upper one is devoid of a loop, while the lower one has a very marked loop; in that regard, also, there is a marked dissimilarity. The extension of the upper "h" in the word "him," I notice, extends below the base line, while the "h" in the word "half" extends down only to the base line; in that respect they are dissimilar. In this letter "h," in the word "him," and this "h" in the word "half," I think that the angle is hardly dissimilar. I notice that there is a curve there while this is an acute angle here, but I do not think that is so dissimilar as to be marked. It is a dissimilarity. I think that its dissimilarity would be another point against the identity of the two letters that an expert on handwriting would take into account. Take the next letter "h" in the word "his," after the word "part"; that also has an acute angle, while the lower "h" in the word "half" has the same kind of a curve. That is also dissimilar in that "h." Taking the letter "l" in the word "half" before the letter "l" in the word place; I see that has an acute angle while the letter "l" in the word "half" is made with a curve. The letter "l" is generally similar on this instrument. I notice that the letter "l" in the word "place" ends with a curve; has a marked curve. I do not think that the letter "l" in the word "half" has an acute angle; it has a slight curve in it. I think that one has a slight curve in it; it is not an acute angle in my opinion. It has a sort of a slight curve, a very slight curve; I would call it more or less of a curve; I would not call it an acute angle. Examining the figure "2" upon Defendant's Exhibit "L," and Defendant's "K" of this same instrument, right here (indicating), and that figure "2" in 1902, I do not see much dissimilarity between those two. I cannot see much dissimilarity in those two there. There is a possibility that they were made by the same hand, but the loop right here—as an expert on handwriting—from a comparison of these two, I should say that the same person did not write the figure "2," contained within the bracket upon the erased portion of the instrument Exhibit "L" of Plaintiff's Exhibit 1, and as shown upon the photograph marked Defendants' Exhibit K, and the figure "2" contained in the number "1902" next following the erased portion. Examining the figure "2" contained in the number "1902" next following the last number 1902 referred to in the same instrument, I think there is a similarity between the "2" contained within the brackets upon the erased portion and the "2" in the number "1902." As an expert witness I would say there would be a question in the identity of these two.

That figure "2" is made with perceptible curves and upward strokes, while the figure "2" in the second "1902" is made oval with the last stroke of the "2" extending along the base line; in that there is a marked dissimilarity between the two. It is such a dissimilarity that people who write 2 in one way seldom write it in the other, if written under the same conditions. I have had experience in examining papers called contracts and the *and the* like, which contained similar figures to those contained within the brackets, in this erased portion; I have seen some. I have observed that persons who make their "2's" in that form—make them almost continually that way; particularly the upper stroke at the end of the 2. It is a fact that men who make their "2'2" in that way seldom make a "2" as contained in the brackets. An examination of the "2's" in the different numbers with that dissimilarity would leave it an open question with

me; I would not give my opinion on that as to whether
 361 they were written with different hands. Possibly, if a person were attempting to forge this number, trying to imitate the "2" contained there, if they wrote the other portion pretty fair they would possibly slip up when it came to the "2"; a person who writes a "two" in that way seldom writes it in any other, taking certain characteristics. Those characteristics are from general observation of the letters as they appear to me from minute observation, and no technical one-rule or art in determining the identity of handwriting. My experience and knowledge has been from practical work and following no set rules. Examining the figure "2" in the next following line, after the second "1902," in the word and figures "5½" the letter "2" in "5½ Little Creek," that "2" and the "2" in the brackets are dissimilar, but it is apparent to me that it is written by the same hand. Taking the lower "2" in the description of the Bench claim known as the Rocky Bench opposite No. 2, on Extra Dry, taking that figure "2" and comparing it with the figure "2" contained within the brackets, and comparing these two, I should say they were not written by the same hand. Concerning the "2" following contained in the "1902," I said they were written by the same hand. As to the first "2" that I examined, the first "1902" and the "2" contained within the brackets, the erased portion, I stated that that one was an open question, that there were some

similarities there: the shape of the loop and the curve, start-
 362 ing down here, are quite similar; one is a little larger, but I see a similarity there in the shape; there is a similarity there. Taking the "2" here; instead of being upward, follows downward, differing from the other "2's" some, except that in that it is a different stroke entirely from this; this one is a straight line; that is a markedly different stroke, but the two figures are somewhat similar. After comparing the "2's" which I found in the photographs, in my opinion, there is no doubt but that the same man wrote the letter "2" within the brackets that wrote the "2's" in the balance of the instrument. They are very similar here—the upper part of this portion of this "2" here is certainly similar and is a certain characteristic which shows that these figures—this figure "2" here and this one here, as I stated, I believe—I believe I have not been asked in the erased portion where the acid has been used; this where the dispute is about. In writing over the surface of a paper in that con-

dition, it would be a little difficult to make exactly the same, while in ordinary blanks you could make them the same, with the ordinary angles and curves. You could not, because the surface of the paper might not be smooth. The surface of the paper in that erased portion is now apparently smooth, but at that time it might not have been. It appears to be smooth and dry now, but at the time it was written I do not know what condition it was in when it was done. It looks to me as though the blur there was caused by dampness. I

do not see anything upon the rest of the instrument in the
363 way of a blur that would indicate dampness. I say that the letter "n" is blurred. I do not see any blur on any letter except that "n" in this instrument, unless there should be a slight blur that I could decipher in the two downward strokes of the "n." There might be some others there; it looks like the paper might have been moist when this was written; I could not tell whether that makes any difference or not; I would think that it would make some difference between that and in its ordinary original condition. When the paper is very moist and you start to write with the pen, it don't hold the ink at all, but blots right out. If there is any moisture the ink will blur more or less; it depends somewhat upon the surface of the paper; that is something that I am not an expert on, however. I should say that it is the moisture in the process of the chemicals which makes the marks upon the paper, causes the ink to dissolve and alters the appearance of the paper. I stated that I could discern the word "three" underneath the word "one." I have examined these photographs before today. Not very closely. Examining this closely, I see a line down here (indicating on Exhibit "L"). There is also something indistinct there that I would define as a line parallel with that. This line right above there is not entirely distinct. There appears to be an extension of that line from above and then continuing on down along there straight through here (indicating)—have you a glass or something I can take; that is
rather a difficult thing to follow; have you a glass? (Glass
364 produced). Examining that under the glass, that has the appearance of coming period, rather than added to that line right under the "n" there, but there seems to be a slight break there in that line. I think I can detect a break here (indicating). I can't see any line running parallel with this line here, only there appears to be something running along below there, following along—there does not seem to be a word. That line might be a part of a letter; it would appear so. That line that you see up there not connected with the word "three" nor part of the word "one," as it appears upon the face of the instrument; I can see no signs of any use for that; there would be no use for it in connection with either the word "one" or "three" as appear from the instrument now. I can make out fairly well the word "three" there. I can see no use for this line here (indicating) as a part of the word "three." I can make out an outline that has the appearance of a portion of a "q"; I don't think it is very distinct. It has the appearance of a portion of a "q." The top of the "q" appears to come right here under the point of my pencil. That might be any line, the top line and bottom line, the top line of the letter "a" following, below the top line

of the letter "a" in "half"; it is a little below the line. I don't seem to find a line extending down below the letter "a" parallel with what appears to be a line of the letter "q." If there were a line there as to whether or not it could be a line of the letter "q" depends on how the "q" is made, or bearing down upon the pen
 365 in making the letter, it might be made by that. I see no other line in "q" that would correspond to that. It would be rather the next line of another letter, perhaps. Between the letter "a" in the word "half" and the "h," I see some mark, but I do not know what it is. I should not think it was a part of the letter "q" which I see outlined there. These appearances of writing appearing underneath there, if it should be writing, or evidences of writing, I should think that it could be a part of the "q," this being "a" in here, then the "r." I do not see "r"; part of the "u" is there. I do not see the "r" very plain. If this is a "q," this line here could be no part of the word "quarter," that I could see. I cannot make out either that it would be a part of the word "half," either. Taking this second line running down through the letter "a," if it be a line, I can see traces of an outline. I do not know if that could have been a line of the letter "f" as it appears there; it is very indistinct there; I can't see any other part of it. There is no indication on there that there has been other writing on there besides the word "quarter," or that the words "one-quarter," have been written there besides the "three," that I can see. I would not like to say that I see any other writing I could not make any letter out of what I see there now. There has been something there upon this mark, but no part of a letter that I can see. I don't see how that could have been
 366 the word "one-half" or the word "one-quarter," as shown upon the exhibit at this time. What you have called my attention to there could have been a part of the "one-half," if that was a part of another word. I can't see, with the naked eye, what might be indistinct traces of a mark on this side of the "h." Examining Exhibit "L" where you indicate, it looks as if it might be a blur in the paper, but I cannot make any part of a letter out of it. From the appearance under the glass, it could not be any part of any letter. Just above the "h" in the word "half," there appears to be a mark of some kind. I have looked at the letter "q" as designated by me on this Exhibit "L." I should not think that that mark which you indicate above the letter "h," could have been any part of either the word "half" or the word "quarter" written in there; so that mark, if it is a letter of any kind represented there, was no mark connected with either the words "half" or "quarter." I do not know anything about erasures.

Question. Now, I wish you would examine this Exhibit "L," the discoloration below the line under the word "one," originally under this discoloration as it is here in the original exhibit (No. 1) and also upon that Exhibit "L," and then I want you to state whether or not the line of discoloration is not straight down to the letter "h," or does the edge of the discoloration extend below the line. State whether or not that is a fact. And I will add to my question.
 367 Mr. Thatcher, if a writing were obliterated, if the ink would not naturally run to the edge making a line at the point

where it stopped, and if that line did not start down to the lower portion of the "h," as is apparent there in the word "three," and if that might not be the other line we are talking about, the ink stain with the acid?

Answer. Yes, from my examination of this Exhibit "L," I believe that the line is down at the edge of the stain.

The WITNESS (continuing): In examining this, I would say there appears to be a line continuing with this "h" stroke which is the edge of this stain here, whatever it may be. I don't know whether that is in question or not. In passing upon handwriting I take in the characteristics somewhat in the same way I would in recognizing an individual. It would be true in handwriting; take a certain characteristic by itself it would not be possible to judge whether or not it was a person's handwriting, unless it was a particularly distinct one. I note the handwriting in the body of checks in particular instances. If a check should come into our bank, the body of it written in your handwriting, and the signature in Mr. Gilmore's handwriting, I think I would notice that before paying the check.

Question. Now, would you say that the mark above the letter "h," the lower part of the letter "h" and the upper part of the letter "a" in the word "half," was from the discoloration in the paper?

368 Answer. I am in doubt as to whether that is a discoloration or something that has been on there.

And thereupon Mr. HOWARD AMES, a witness produced by the plaintiff in rebuttal, having been duly sworn, testified as follows:

(Questions by Mr. GILMORE:)

The WITNESS: My name is Howard Ames; my business or profession is banking; I have been associated in the banking business here and outside about eleven years; I am at the present time Cashier of the Nome Bank & Trust Company in Nome. I was Assistant Manager of the Bank of Cape Nome; that was what was known as the Solner bank; I was cashier of the — Bank of Juneau, Alaska. I was receiving teller of the Washington National Bank, and clearing-house clerk of the same bank. The duties of a receiving teller are principally to receive deposits from depositors of the bank; I have held the position of clearing-house clerk; the duties of clearing house clerk are to make clearances and checking the clearing-house checks, inspecting checks, examining checks and signatures, endorsements, etc., and accounting; in fact, all the writing upon checks, endorsements and so forth upon checks is examined and inspected by him.

Question. Now, from your experience in that work for perhaps a dozen years or more, are you able to pass on paper writings, distinguishing and determining whether or not they are genuine, or

369 making comparisons to pass upon whether or not they are the same handwriting—do you feel competent to pass upon that?

Mr. COCHRAN: Objected to as irrelevant and immaterial.
The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Answer. I have found it necessary to do so in a great many instances; most occasions of that kind, matters of that kind, have been referred to me to examine and pass upon.

The WITNESS (continuing): I have seen before the instrument you hand me for inspection, a document marked Plaintiff's Exhibit No. 1, and have examined it carefully before.

Question. I hand you also Defendant's Exhibit "B," a deed which is admitted to be in the same handwriting as the deed which you hold in your hand, all written in the same hand, with the exception of the two words "one-half" and the figures " $\frac{1}{2}$." Now, also for your inspection, a contract and agreement dated June 30th, 1900, which is also admitted to be in the same handwriting; also a letter dated June 11, 1906, admitted to be in the same handwriting as the other instruments I have shown you, marked Plaintiff's Exhibit No. 5, all admitted to be in the same handwriting. We also tender you for your inspection two photographs, which counsel have agreed

shall be marked Plaintiff's Exhibits No. 14 and No. 15, which
370 are enlargements of the first exhibit I handed you, or a portion of it. I wish you to carefully inspect them as much as you desire before you pass upon the writing, compare them carefully, the words "one-half" and the figures " $\frac{1}{2}$ " shown in the discoloration in the first exhibit handed you, Mr. Ames. I may state by way of explanation that the plaintiff alleges that the figures " $\frac{1}{2}$ " and the words "one-half" were originally written " $\frac{3}{4}$ " and "three-quarters;" the defendants alleged that it was originally written, under the discoloration " $\frac{1}{4}$ " and "one-quarter"; in the one instance claiming that the instrument was raised; in the other that it was lowered, and that this change or alteration was made in May, 1906.

Mr. GILMORE: I will withdraw the latter part of the statement; it is not a part of the question. I merely stated that by way of explanation, but I will withdraw the latter part of the question. The question itself is the only question the jury has to pass upon, anyway, without the explanation.

Q. Whenever you have made a sufficient examination as to the handwriting, will you answer the question, please?

A. Do I understand that it all was supposed to have been written about the same time when the alteration took place?

Q. No; that is admitted to have taken place the latter part of May, 1906.

A. Is there any admission as to when that took place, as to the time?

371 Q. That is one of the disputed questions we are now trying before the jury, Mr. Ames.

The COURT: No; there is no admission in the record as to when the alteration took place. I believe it is admitted, however, that it was subsequent to the date of the instrument, the date when it was written.

Mr. COCHRAN: Yes, sir.

Mr. MURANE: That is correct; yes, sir.

A. Subsequent to the date the instrument is dated?

Q. Yes. All the writings which are submitted to you are admitted to be in the same handwriting, with the exception of the two words you are to pass upon, and the figures inside the brackets; you don't have to pass upon any of the rest of it.

The COURT: They are handed to you for the purpose of comparison of the writing in question, in dispute.

Q. Now, from the examination you have made, Mr. Ames, are you able to state whether or not the same person who wrote the body of the instrument Plaintiff's Exhibit No. 1, the deed with the discoloration on the words "one-half" and the figures " $\frac{1}{2}$ " also—wrote both of them?

Mr. COCHRAN: We object to the question on the ground that it is incompetent irrelevant and immaterial; the witness not having qualified as an expert upon signatures, and not as an expert in general upon handwriting, is not qualified to pass upon handwritings in general.

372 The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

A. In my opinion, it was written by the same party who wrote the rest of the instrument.

Q. Now, just refer to the photographs, this one being Plaintiff's Exhibit No. 14; and now, after examining it, are you able to state whether you can decipher any writing or any word in the background under the expression " $\frac{1}{2}$ " within the discoloration?

Mr. COCHRAN: That is objected to as leading?

The COURT: Overruled.

To which ruling of the Court, the defendants, and each of them, then, and there excepted, which exceptions were allowed by the Court.

Q. If so, state what word.

Mr. COCHRAN: Objected to as leading.

The COURT: Objection overruled.

To which ruling of the Court the defendants then and there each excepted, which exceptions were allowed by the Court.

A. I see some writing in the paper there.

Q. What words do you decipher?

Mr. COCHRAN: That is objected to as leading.

The COURT: Overruled.

To which ruling of the Court, the defendants, and each of them, then, and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): First, if there had been a word written under the "one," which I believe is "three." Under
373 the word "two" I can see a good part of some letters, but no whole word. No word that I can decipher. I believe I can distinguish letters.

Question. What do you see there?

Mr. COCHRAN: Objected to on the same grounds.

The COURT: Objection overruled.

To which ruling of the Court, the defendants, and each of them, then, and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I can see "q" "u" and then there skips a little space, then I can see the outline of an "r," then quite a skip, and then what appears to be "er," right under the tail of this defect here, then a finish of an "a" and a defect. Right in there (indicating) under the glass, you can see it quite plainly under the glass. I can see it quite distinctly under the glass; right under the finish of the "2," right under the finishing stroke of the "2"—there is an "e"—there is an "r," and then, either they have jumped a space in the writing in regard to the amount or in removing it have left a line; and then there are the letters "er," here, that I can just see the outline of here, smaller, much smaller than the starting of the word; the "q," "u" and "r," that I can see distinctly. These letters are much larger than the "e."

Question. Now will you just take this other deed made on the same day by the same party, and examine the writing in that deed

374 "one-quarter," and state whether or not there is any similarity between the written "one-quarter" and what you can see in the written "three-quarters" under the discoloration, or so far as the word "three-quarters" is written there?

Answer. The only similarity I can detect, on account of the writing—the present writing over it—it looks so very indistinct—is the one feature with the two letters, which I see, that I showed to the jury.

The WITNESS (continuing): Here, the "er." There seems to be the same personality in the writing of the "er" in the word "quarter" in the two writings, in the furnishings of the letter. The "q u a r" are principally about the same size as they are in the "quarter" in this instrument, practically the same size as the "quarter" here. By practically the same size, I mean the relative size of the letters, in the word which appears to be "one-quarter," in the one which has been erased, the word "quarter," are comparatively the same size as they are here in the "one-quarter" here in this instrument here. In the exhibit in question, Plaintiff's Exhibit No. 1, in comparing the size of the letters with the other "r's" and "e's," in the same instrument; I can see only the "r"—the joinder of the "e" and "r" appear to be the same. Comparing the "er" with the other "er" in Exhibit No. 4, relatively they compare with the other letters in the word, the same; relatively the same.

Q. State whether or not you see any words or letters under the discoloration other than the "1½" on Exhibit No. 1; any other
375 words that you can see; and what you can see if anything; take the enlarged photo there and see if you can see anything on that under the discoloration?

A. Yes, I can see a portion of a word that appears on that enlargement to be "three"; I can see a "t" and an "h"—yes, I can see a whole word—I can see all of the letters of the word "three."

Q. How about the word "quarter"—can you see that?

A. I can see a bit of the first part of the "q," the body or a part of the "q" above the base line, and a portion of the part below the base line; the downstroke.

Q. Now, I direct your attention to the figures " $\frac{1}{2}$," inside the parenthesis. Are you able to decipher any of the figures in the background of the " $\frac{1}{2}$," or anything that looks like figures? Referring now to the original instrument, Plaintiff's Exhibit No. 1?

A. There is apparently—the present figures have been written right over something that has been written there before.

Q. Are you able to decipher, taking the enlarged photo, are you able to decipher any figures in the background back of the " $\frac{1}{2}$ " either with the glass or without it?

A. No, the present writing has been placed so completely over what has been there before, it makes it impossible for me to see what has been done before—the downstroke or the stroke starting
376 the figure "2," and the end of the "2" making the ($\frac{1}{2}$) have been placed almost exactly over—you can see where figures begun and ended before, but the "1" has been placed over, almost exactly over, in such manner that you cannot tell what has been there before.

Q. You cannot tell to state what figures have been on there before?

A. No, I could not attempt to state.

Q. Now, Mr. Ames, just examine the enlarged photo (L) the words you see there "three-quarters"; are you able to state—take the word "three"—are you able to state, from the examination you have made, whether they were written by the same party who wrote the rest of the instrument or not?

Mr. COCHRAN: That is objected to as wholly immaterial, incompetent and irrelevant.

The COURT: We overrule the objection, but in answering the question, you should answer it yes or no.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): Well, I have not had very much opportunity to examine this instrument, and I do not know that I would like to pass upon that, but I will do my best, and I would say from what I have seen—I would like to have a little time to consider this question and make a full comparison before I answer. I would
377 like to have three minutes—this is the first time I ever looked at this—I would not like to pass an opinion upon a matter of this kind. I believe I have examined it sufficiently now to pass my opinion upon it.

Question. State whether or not, in your opinion, it was written by the same party who wrote the original instrument.

Mr. COCHRAN: We object on the ground that the witness has not qualified as an expert upon handwriting having been qualified only as an expert on signatures alone.

The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them then and there excepted, which exceptions were allowed by the Court.

A. I believe it was written by the same party who wrote the body of this instrument. (Ex. "L.")

Cross-examination.

The WITNESS (continuing): I was first employed in the banking business in Seattle, as clearance clerk and the several duties I performed, clearance clerk, remittance clerk, clearing-house clerk; bank messenger first; I went in as a small boy, about sixteen years of age, as bank messenger, and I had several duties coupled with that such as clearing-house clerk; as clearing-house clerk a portion of my duties were to examine signatures; to examine signatures and to pass upon the genuineness of checks. I made a study of writings simply as my duties in the bank made it necessary for me to observe these

things. I was called upon to be alert and observe. Prior to
378 that time a part of my duties had been filing vouchers and checks, papers, everything that came into the bank, and it was necessary to observe those that had signatures and the writing in the instrument to determine where to place them and to inquire where they belonged, what they were, in order to arrange them in the bank, and in that way I became more or less familiar with handwritings, or so much so as was necessary in that line of work. I would place them where they belonged, by examining them and understanding what they were, and where they properly belonged. Those instruments had to be passed upon by somebody able to take them and place them in their proper places, and I did so, saw them and passed upon them every day; that was a part of my duty every day, and as I expected to be promoted some day, I made the habit of observing closely writings and signatures of different instruments. By comparing one signature with another, knowing that you will be called upon in a bank to observe those things, and I observed all that I could, that a young man in a bank, if he is anxious to rise, I observed and compared those things, as I say, and I cultivated the habit, so to speak, of being watchful and observant. I tried to confine myself to my business and to find out everything about the business that I could associated with the banking business, examining signatures and in that particular that feature of the business is necessary—in some departments of it, at any rate. As messenger-

boy and clearing-house clerk, I thought I knew that work
379 thoroughly in the bank, so much of it as I could know in that capacity. As clerk in the bank, part of my duties were in the capacity of clearing-house clerk, and as clearing-house clerk I examined signatures. I believe that my experience as messenger-boy in the bank helped me considerably in the knowledge of handwriting. I have no general rules which I have followed in my profession of being able to pass upon and being able to recognize a person's handwriting other than by its general appearance. I have no rules of any kind that I have adopted, other than just my habits of observing in being able to pass upon and recognize a person's hand-

writing and its general appearance, in addition to the person who has not had any experience in connection with signatures and writing. I have not given any consideration to any rule that I have followed. The rule I followed in determining signatures was by comparison, by knowing a genuine signature and comparing the relative formation of certain letters and comparing them. I used the comparison of the shape of the letter with another, a manner in which a writer would write two letters; the manner in which one letter would follow another, comparing the same signatures made at different times, the general size of the letters above and below the line; the width or distance below, the general slope of letters—people write at different angles—and the spacing between the letters. These are

some of the rules I follow in observing and detecting handwriting or signatures; there might be more. I considered

all of those rules in passing upon the genuineness or non-genuineness of signatures to checks. The signature to a check is always signed. Checks are frequently printed or typewritten in full. Frequently checks are written in other people's handwriting and signed by another person than the one who wrote the check. If it should ever occur, as I have known it to a number of times in my experience, where there was some question, not about the signature, perhaps, but whether or not the amount in the check had been raised, or where the check was in another man's handwriting, other than the signature, and there was some question about the check or signature being genuine, and then it made it necessary to compare the difference in the signatures to different checks, the different writings upon other checks or other instruments. I have discovered a forgery. I could not say just what year it was, but it was while I was with the Washington National Bank. I didn't make the discovery absolutely first, that is, I didn't make it alone, but I was one who assisted in making the discovery. I am unable to recall the name of the forgery just now. I learned it was a forgery from the general appearance of the check. It was an account we were all very familiar with in the bank, and by looking up the signatures carried on our books, which is a feature of all banks, we found that it was a forgery. That is the only forgery that I can recall that I ever discovered; that is the only one that I ever personally observed so far as I know. That is not the only

instance that I ever helped or ever had to compare whether there was an attempted forgery. I have seen many instances of forgeries, or where attempted forged items have been shown to me, where forgeries have been made or attempted to be made, and I have studied them and we have discussed the matters with the other employees of the bank, and have handled the instruments myself to endeavor to be able to pass upon them myself. I have seen another forgery in the same bank. Within about three years I was in that bank. It was another check. Also I have seen a forgery of another instrument which was presented to me. I don't recollect whose name was signed to that forgery now, it was a matter that was passed to me for inspection. I don't recollect whose name

was forged to the other check. I don't recollect the parties name now, because it has been a good many years ago. If I remember correctly I saw a check in Nome drawn by Carlson, Ashley & Adams, or purporting to be signed by R. D. Adams; Bob disclaimed the signature. I don't recollect who forged the signature now. I don't think that forged check *w* was passed upon anyone. The check was brought into the bank and was brought back with the vouchers by Adams, or some one of them, after it had been through the bank, and Bob said it was not his check, not his signature. It had passed through the bank and payment had been made upon it, but as I remember it was endorsed by some one. There were three or four working in the bank at that time, and I don't know who had
352 paid it; there was no one who had any knowledge of who had passed upon the check. Four times in my life, I believe, I have passed upon and examined instruments that had attempted to be forgeries; four times, that I recollect; the rest of my experience has been in examining genuine signatures, genuine handwriting known to be genuine. My experience in passing upon instruments attempted to be forgeries, or known to be forgeries, has been limited to four times in my life, with the exceptions of examining and comparisons of photographs and pictures of noted cases that have become common before the public which I have read in articles upon cases which have become noted in banking institutions and been written upon, perhaps. Those that I have mentioned are the only times that have come under my personal observation besides these publications which contained the photographs or printed forgeries that I have read; those bond forgeries, articles upon those celebrated bond forgeries, I don't recollect the name. Discussions since the forgeries were exposed, written by imitation, or so-called imitation handwriting experts, experts on handwriting, showing the original and showing the imitations—showing the original signatures, the names of the parties, and the signatures whose names had been forged, and also the forgeries, drawing attention to the different characteristics of the writings in different ways, analyzing the writing and drawing the attention to the general characteristics in
383 different ways. My personal experience in handling writing that I have examined and detected forgery in or have had an opportunity to examine and observe imitations of handwriting is confined to four cases that I have now clearly in mind; and these are not sufficiently clear in my mind to remember the signatures that were forged, except the one which I mentioned, which happened within the last four years here in Nome; that is the only one which I have sufficiently clear in mind to be able to recall whose signature was said to be forged. A person in forging an instrument would naturally try to imitate the person's handwriting that they were attempting to forge in the instrument. I should think, that in doing so, if there was any stated general outline, anything unusual in the person's handwriting, they would attempt to imitate that. I should think that an expert in passing upon the handwriting, in determining whether or not an instrument was forged, would look to those general outlines, or the general appearance of the whole instrument.

I don't know what they might look to, but the spacing of the letters would be one of the features that I think they would be able to employ; would look to the loops and hoops of one letter or a whole word, as employed in the letters comprising a word with reference to one another. That would be true with reference to almost any word, and with reference to the spacing of the lines—of letters with reference to the lines—whether parts of a letter written were arbitrarily written above the line or below the base line—all those things

I would think would be necessarily noted. The spacing of
 384 letters in the same words depend, however, upon the conditions under which it is written; you can't space perhaps regularly, if you have only a certain space to put the words in. I have known that to be the case in examining people's writing under certain conditions. The space of the letters, the distances apart, is one of the characteristics with which you determine the genuineness or nongenuineness of writing. Generally the width of a letter is another matter, whether or not they are uniform, you note in determining the genuineness or nongenuineness of letters, and whether they are made with loops or angles or curves. The width of letters above or below the base line is another important rule in determining the genuineness or nongenuineness of a writing; one would consider, I should think, whether a certain letter was habitually written above or below or close to the line; whether some greater above or below the base line, or whether they were of the same general character, I should think would be another important thing to be considered in arriving at the genuineness of a signature, how a person would write ordinarily under the same general conditions; all those things I should think ordinarily would be taken into consideration. All of those things an expert would employ in detecting whether or not a forgery had been committed, or in detecting a forgery, in distinguishing from the genuine. I should think they were all necessities in detecting forgeries. I believe all forgeries would attempt to resemble the genuine. I

385 can't write very well so as to resemble hands other than my own. I am pretty arbitrary myself. I am not very adept at that; not adept enough to succeed very well and not be detected. Taking the letter "o" in the word "one" and comparing it with the "o" in the word "one" on the top line, the appearance of these two is generally similar. Noting the loop as it comes down in the next "o" written through the base line. Now, the letter "o" in the word "one," in the erased portion of that instrument; this one is above. I noticed that. I don't think that is an indication against the genuineness of this "o." The rule with reference to the base line has generally to be considered in a person's handwriting, but when written under the same conditions only, I should *should* think, is it so important. Taking, that particular instance, as distinguished from a general thing, if you have seen it in these other words—this one up there—this one up there (indicating), using those in comparison, it would be very hard to say which one was natural, or which one was the usual way of writing that letter, or which one was genuine; no doubt one of them was genuine, but which one of them

was genuine would be something I would hardly like to say unless I had seen it written or knew who wrote it, perhaps. Noting the one you say is admitted to be genuine, and the space between this book (indicating), this finishing loop around below the base line, and comparing that one with the one in the first line, taking into consideration it looks all right—I can see no marked distinction between them. I do not know what others might think, that “o” in the disputed portion, I don’t think would point to the contrary of the genuineness of the “o” in the erased portion. I never considered myself as an expert.

Question. Now, take the letter “n” following. You notice on this first “n” in the first line, the first “n” in the one place here. Is that an exact “n,” a letter like the one following? You notice that the lower part of the first “n” is written at an angle at the top of the center stroke of *t* the top “n,” is it not, while the lower “n” is at an acute angle—did you notice that?

Answer. Yes, sir.

The WITNESS (continuing): I did notice the angle. I think you are mistaken about the “n” in the next line being written with quite a curve. I think I can explain that. Right here—if it had not been erased and the surface of the paper discolored, my impression is that it would show that angle—I am very certain that it would show that angle, but the pen in traveling over the surface, it encountered something in the ink—the ink might not be dry over it, so that there is quite a blot there, or a little blot there which I detect there which at a long distance looks like it might possibly be a curve. It might possibly have been made there when the paper was made, before it was written on at all; it might be a defect in the paper, or it may have been written on when the paper was damp. I think the surface of the paper is affected. Just at this point—the jury can see it possibly as well as I can. Where the stains are; it appears there as if the surface of the paper was not as smooth as it is where it has not been tampered with.

Question. And that is the way you account for the curvature in the bottom part of the “n” at that point, of the “n” in this lower “n” in this word “one”?

Answer. There is a little blot there at that point as though there had been something across on this discolored portion here.

Q. Over the “n”?

A. The first blot you see there as if some one had written while the paper was damp on there, or something which showed that the pen didn’t work well there. You take this line here down to this point, you will find that it makes as great an angle here as this; this may have been caused by the blot in the ink there. You will notice that it started both above and below this line here which has a tendency to make it look like a curve. I think that is not a curve. I think that would be the same stroke as near as one could make the same stroke. I have examined the letter “h” in the lower line. I notice here, right at the point where the “h” starts, it is considerably above the base line. The pen had started in with a stroke nearer the base line at least half an inch. I noticed that and I took that into

consideration, *cer*-stroke nearer the base line at least half an
 388 inch. I took that into consideration, I also noticed that the
 party in making this "h" runs up here (indicating) comes
 down a bit, making a bit of a curve with the pen, not an angle at
 that point, and then in the finishing of that upward stroke, finished
 with an angle and no loop. Holding it under the glass, it is not
 an acute angle in the "h" above; it is not an oblique angle; that is,
 in the absolute finishing of the up-stroke; then it comes down to the
 downstroke in the same—from that point they are the same.

Question. Now, that compares favorably, I presume, *w* with the
 loops in the "h" in that portion of the erasure, does it? That is one
 of the marks of similarity by which you determine these "h's" were
 made by identically the same party, I presume?

Answer. No. You don't from me—I have told you nothing of
 the kind. I will not admit that.

Q. All right then, all right then. Now take the letter, this part of
 the "h" here, the lower part of the "h"; that upward stroke in the
 finish of the "h"; then the long downward stroke; that is as acute
 an angle as one could well draw it, is it not? That is not a curve and
 there is no blot there either?

A. No, I don't see any; there is more of an angle—there is more
 of an angle than there is in this, that is true.

The WITNESS (continuing): That is one important point by
 which an expert on handwriting would determine whether it was
 genuine or nongenuine handwriting. Yes, that might be a point to
 take into consideration. It was all taken into consideration.

389 I don't recollect any particular article that went into detail
 about that particular point.

Question. Now, just examine this instrument, Defendants' Exhibit
 No. 15. Now, compare the figures, the lower " $\frac{1}{2}$ ", in the erased
 portion. Now, do you notice the "2" contained within the brackets.

A. Yes.

Q. Following down 1, 2, 3, 4 lines below and notice the "2" at the
 beginning of the 4th line?

A. Yes, it is very dissimilar.

The WITNESS (continuing): There is some question in my opin-
 ion whether that "2" was made by the same hand as the "2" in the
 brackets. Taking the particular "2" in the figures in question, I
 would say that there might be some doubt as to whether the other
 figures in the erased portion were made by the same hand, but taking
 the figures in the other photograph, I would say that that one was
 very much nearer like this one, and so I think that possibly it was
 made by the same hand. As to whether the figure "2" in that instru-
 ment and the figure "2" inside the brackets being made by the same
 hand, I should want to examine more of his writing, and compare
 with this more accurately, before I would pass an opinion upon that.
 From the photograph, I cannot compare the two in them as much as
 I would wish before expressing an opinion. I don't consider myself
 an expert on handwriting. I am not enough *enough* of an expert
 on handwriting to do that anyway now. From my common sense
 and discernment, the general appearance of it would be alike.

390 I do not think that my positions of trust in banking-houses, as
 counting-house clerk, messenger-boy, and so forth, have quali-

fied me, from that experience, to pass very readily upon such isolated portions of a handwriting as in this instance. I should not want to give an opinion until I had had considerable experience and had made considerable tests. Under my employment in a bank I would not care to pass upon a signature without more careful examination than I have given to this matter here. I would not want to say that my common sense tells me that these two figures to which you have last directed my attention are so dissimilar as to indicate conclusively that they are not in the same handwriting.

Question. Now, you notice between the end of the "2," where it is shown in the brackets, in this manner, where it is made like that—you have noticed the other "2" like that—you have noticed the same thing in making the figure "2," in that way before, have you not?

Answer. Yes, sir, I have seen that.

Q. Now, have you noticed that when a party makes a "2" like that, he invariably makes it like that, and never writes a "2" like this one?

The WITNESS (continuing): That is a very unusual thing. I have seen exceptions but those things are unusual, in ordinary handwriting and makes a "2" like that, he most always makes his letter

391 like that, when he is following his usual hand; that is a custom he will usually follow. It is very unusual for him to change unless he is particular and wants to change his stroke for some reasons. It is very unusual and extraordinary for him to change his manner of making a letter in his ordinary handwriting. Comparing these two letters, the one in the impaired instrument and the one on the fourth line below the erasure in the same instrument, I would say as an expert that both were made by the same hand; confining yourself in your comparison with those two letters alone, I would say it would be very unusual. It would be a very unusual thing to drop down two lines in writing the same instrument. Looking at the "2's" in the 1902 instrument, and comparing it with the "2" in the brackets, that is coming a little bit closer there, but it changes considerably too; it changes considerably. There is the same dissimilarity between the "2" in the brackets, the "2" in the "1902," as there is in the "2" in the brackets in the first "1902." Following the "2" in "1902," there is nothing similar there. There is not anything similar where the "5-1/2" appears in this. In this one at the bottom the upward stroke is unusually eliminated; the upward stroke in the figure "2."

Question. Now, that is a chronic characteristic in a person's handwriting—he writes it always that same way, does he not, when he writes it that way originally, and especially in the figure "2" is it not?

Answer. Well, let me take that glass a minute, will you?

392 Q. In taking any character of figures or letters of people who write that way, nearly always making a "2" downwards, with a downward then this peculiar upward stroke, it usually takes that same tendency, does it not?

A. Yes, I believe it does.

Q. Now, is it not a characteristic of a person's handwriting, where they make a "2" in that way, that after four or five years, if it is made the same way, that it has then become a characteristic of a per-

son's handwriting, and they always make it the same way, do they not.

A. Yes, as a rule.

The WITNESS (continuing): That is, the only "2" on that paper that has taken the upward stroke in that manner is that figure "2" (indicating). I was able to discern "3/4" under the letter "l," that is, I was able to discern what I took to be a "3" under the letters spelling the word "one". I can see traces of a double "e" out there and down there and there (indicating).

(Q) You notice that extending down over the letter "u" something appearing to be a "u," continuing that stroke over these? Do you notice that?

(A) Do you mean the erasures down below the line?

(Q) Yes, continuing that stroke down—now, just examine this one (Ex. "L"); see if the letter "h" that you say runs below there, what is joined to that after it runs below there, what is joined to that after it runs below the line; what is joined to that after it runs below the line; is it either the letter "h" or the figure "3"; see if you can see that running below the line?

393 A. No, I see nothing only what seems to be the line of demarcation between the discolored portion and the uncolored portion of the paper.

The WITNESS (continuing): That is what it is. I think that is the line of demarcation down here? (Ex. 1.) I see traces of a line that is shown as extending below the line here. You mean where the ink is here? I don't see traces of that line following down here. I don't see that line the width of both lines following down the line of demarcation. I don't see that. It might be a line where the ink is. I don't believe there is as much indication of a line on that instrument lying along the line of demarcation as there is there. I have had a good deal of experience with this stuff that has been used upon this, or that I believe to have been used upon this, and I notice the same feature with this that there is generally with the use. Many times the paper is affected, and always appears—after a time elapses, a certain interval of time—I don't know just how long it has to be, but you can always see this discoloration coming out. I think the discoloration is due to the time and the action of the acid upon the chemical in the ink. I have never used this chemical upon this white surface unless there is something practically the same as this discoloration comes out upon the surface of the paper after a certain time has elapsed. The chemical itself seems to be perfectly eliminated, but something that is in the compound of ink seems to become affected. I have used two acids and they make the same identical mark, but unless there is the ink there first there seems to be no discoloration there at all, so I have
394 decided that it is the action of the acids upon the chemicals in the ink. I don't know what the two acids contained in this eraser are; I simply know that there are two liquids which I took to be acids; I never took the trouble to ascertain what they were; I simply used them according to directions upon certain oc-

easions, under similar conditions and I noticed there was always a certain discoloration appeared upon the paper after a time. I presume oxalic acid is used; I don't know. The acid and the alkali used together might not discolor the paper. I am not experienced in the use of the chemicals; I simply followed instructions but I could not say whether that was what made the discoloration or not; I don't know. I don't think I ever tried to use an alkali to take out a alkali. I don't like to use the stuff because it does discolor the paper; I have never tried to use it only to use the two of them together, and I find that it stains the surface of the paper, tends to a discoloration of the paper. Taking this enlarged photo, Exhibit "K," I think I can discern a "q" underneath the "h" and "a" following the "h" very plainly. I can see a "q" and a space, and an "a" and an "r," on this one that I could not distinguish on the larger one; I can see the outline on there which looks very much like the letters "er" and "e" and an "r." Examining Exhibit "K," underneath that "f" or in the vicinity of the "f," I would not attempt to say that I see any writing under there. I should not say that it had the appearance of there having been some writing there.

395 I should say that that was where the fluid ink eraser—the points where the eraser, when pushed out of position with the glass;—when I used to apply it I always noticed that as soon as the ink became displaced and disappears, you will find the surface, the outer edge of the erasure is more prominent than under the letters themselves. That is not universally true, but that has always been my observation of it. I have never attempted to make any experiments with it except in actual practice. Observing these marks above the letter "a" between the letter "a" and "h," well, that is where it is very clear that there is a portion above the base line of the letter "q." That don't seem to be connected with anything those marks above that; if the letters were connected with anything, it would be about the base line; every letter starts, as a rule, from the base line. I don't think that that could be a part of the "quarter." It does not appear to be connected in any way. It appears to be something. There may have been a mark in there apparently not connected with anything; it is not connected with any letter following that I can see, nor with any letter before. I don't think that it is writing or has been writing, the marks that we see there; it is not a pen-mark, or pen and ink, I don't think. On this line right below that, I do not think it could be a blot; it might be. It might be something; it appears to me to be the edge—just something that is due—I don't know what ink they employed that would have the effect of making a mark like that there. I say there is a mark there that could not be the blot of the pen—it looks as if

it might be something like a blot, or the edge of the moisture, or there was something written while there was moisture there.

396 It does not look like a figure or a letter or anything else; looks as if it just happened to be like you see in some instruments, where there was a poor place in the paper, or like someone had written something in there, or started to and that there had been something dropped on it before it was dry, and the moisture had

left a stain; I could not say what it is; all I could say is that there seems to be something there that I did not see in the instrument when I examined the instrument before. I don't remember seeing it when I looked at it the first time. Here it is. As I recall, when I saw it in Mr. Gilmore's office, and I saw no mark there then, and I see no reason why I should have overlooked it at that time, or why it should be there. It is a peculiar line above there, quite a bit higher than the words "one-half." I am pretty sure that that mark was not there when I looked at it before. The instrument when I first saw it, was in Mr. Gilmore's office. I don't remember of seeing this mark when I saw it in Mr. Gilmore's office; of course I didn't examine it very minutely there. I am speaking now with reference to this line above the letter "a" and between the letter "a" and "h." That line does not seem to be connected with the word "quarter." You can see here—you can't see it on this one. I could not seem to locate that line before—it looks just about the same—you will notice up around the edge in there if you will examine

397 this with the naked eye, you will see something in there, starting above these letters here and stringing along right here about the top of the "h" you can see something in there, can't you? It does not seem to have anything to do with the relative positions of the letter certainly, but it looks like just a mark—not like a letter, but just a mark—don't look like a pen-mark at all to me—you can see it with the naked eye. It looks like someone had dropped something on the paper, possibly. I don't think it is constructed like the rest of these marks down here. In fact, these pen-marks have a very different appearance to me; it looks like it might have been a demarcation in the paper from something having been dropped on it. It might have been that it was pen writing originally, but had been completely taken out and the words "three-quarters" written over it, there might have been some traces of the former writing left there. I have never been able to get the use of acids and ink erasers down to so fine a point as to be able to completely obliterate it, or partially. I have tried, but whenever I have tried it leaves a yellow mark which you can still see there. In my experience it will come back there in old writings or old records; in my experience it always leaves some traces, some yellow stains. It may not for years, when you first use it, it will entirely obliterate everything, but afterwards it shows up. I don't think that the acid discolors it. It cannot be the acid alone, but the presence of the ink, with the fluid in the eraser, is my theory, that makes the discoloration. I don't know that I know that it is the alkali that discolors. I have used them both, the common fluid ink eraser, as it comes, usually the
398 two, as I understand, fluids used in connection. I have used them both together; I don't know one from the other.

Redirect examination:

Question. Now, just take the original deed and state whether or not you see such a defect or such a mark as is shown over this letter "h" on this photograph Plaintiff's Exhibit No. 14.

(Questions by Mr. GILMORE:)

Answer. Not to the naked eye; there is none that I can see with the naked eye.

And thereupon Mr. W. L. COLLIER was recalled as a witness in rebuttal by the plaintiff, and testified as follows:

(Questions by Mr. GILMORE:)

The WITNESS (continuing): You will notice, by referring to the notes of yesterday, that I have somewhat contradicted myself in answering the question Judge Moore asked me, and I would like to explain that. Judge Moore asked me if there had been, if it looked to me as though more acid had been applied to one portion than to the rest of it. I have examined it with a glass, and if I may, I would like to make an explanation of my answer to that question. I have examined the photographs and the paper itself, and as I understand the question, what gave the surface of the paper the appearance, as though more acid had been used, if it might not look so. And yesterday I also stated that in my opinion it had not been
399 altered more than once, because the second alteration would discolor different, and I want to make an explanation of that also. The question of the Court was, was more acid used upon the word "one" than upon the balance of the surface of the disputed portion, and that it went only to the top of the "f"; that is, what I had reference to when Judge Moore asked the question. You asked the question, Judge, if more acid was used upon the word "one" as appeared from the surface of the paper than on any other portion of the instrument, within the brackets. I didn't clearly understand your question at the time, but when I thought of it afterwards I thought I had contradicted myself. It was a matter of a word or two. I said that I thought more acid had been used; I wanted to cover the ground within the brackets and not on the entire surface of the paper. I gave the theory that it was necessary that more acid be put on there than covering the whole paper, and when Judge Moore asked me the question, I didn't put it as clearly as I wanted to. I just wanted to explain a little more thoroughly.

Cross-examination.

(Questions by Mr. COCHRAN:)

The discrepancy in yesterday's record occurred to me just shortly after I went off the stand; not long after I went off the stand. I didn't explain it then because it didn't occur to me. This noon I talked with Dr. Chambers. It occurred to me then, but it had occurred to me before that and I went and talked with Mr.
400 Murane. I came up to make my explanation before I talked with Dr. Chambers, but I could not because Mr. Thatcher was then on the stand. It occurred to me soon after I went off the stand, although it seemed perfectly plain to me at the time, when I got to thinking over the matter I thought I had not made it as clear

as I should have, and when I went home, I went then and spoke to Mr. Murane.

Question. You answered plain and unqualifiedly Judge Moore, that in your opinion there had been more acid used upon the word "one" than upon the rest of the paper? Did you not?

Answer. Not over that particular portion, I didn't intend to say, not over the entire surface; that was what I wanted to say.

Q. That didn't occur to you until you went and talked it over with Chambers, did it?

A. Yes, sir.

The WITNESS (continuing): I never talked to Mr. Gilmore about it at all. I never said a word about it to Mr. Gilmore. I did not read over or have read over my testimony of yesterday. I told Mr. Murane that I wished to go on the stand again. I did not tell him about Dr. Chambers having spoken to me about it; I was talking to him at the time Dr. Chambers came in and made mention of it.

Redirect examination.

(Questions by Mr. GILMORE:)

At the time I was talking with Mr. Murane and Mr. Chambers, I had just stated to them before that, and I came back to
401 the courtroom, but Mr. Thatcher was on the stand at the time, because I stopped in the library there, and while I was in there Mr. — called me into the Marshal's office and spoke to me about a matter, and then I went down and I thought they would call me up again whenever the matter came up. I have not seen you, this is the first time I have seen you. I have not talked with Judge Murane at all.

Recross-examination.

(Questions by Mr. COCHRAN:)

Dr. Chambers didn't tell me that Gilmore had sent him to see me. He didn't tell me to go up to Gilmore's office, that Mr. Gilmore wanted to see me. He didn't tell me Gilmore had sent him to have a talk with me about my testimony.

Whereupon Mr. EDDIE BREEN was recalled as a witness on behalf of the plaintiff, and testified as follows:

(Questions by Mr. GILMORE:)

The WITNESS: I was to make out a statement of the mechanical items, machinery, building—I have that statement made out. In going through the papers and books in making out this statement, I found that there were items of machinery not used on the claim, according to the books we had finally had taken over to another claim where they are now being used and no record made of it whatever, and so I have gone over it again and have taken out what-

ever I could find there. The larger items and what they
402 amount to are as follows: Boiler, eight hundred dollars;
stack, seventy-one fifty; steam whistle, ten dollars; engine,
five hundred dollars; self-dumper, two hundred and seventy-five;
dump bucket, sixty-five dollars; that is all. The total amount is
seventeen hundred and twenty-one dollars and fifty cents. I did
not understand that I was to ascertain what time the mine was shut
down; I think it was about six weeks. I said yesterday I thought
about six or seven weeks, that was about right. I found no credit
for any machinery that was removed from the claim; nothing has
been charged that has been removed. I do not know whether or
not any has been removed. I didn't understand that any of the stuff
that had been removed had been charged. I could not tell anything
that has gone to another claim from these books. I gave you yester-
day as charged as part of the expenses thirty-two thousand dollars;
charged in the general settlement. I have no record in any of my
books of any machinery that has been removed.

(By Mr. ORTON:)

There was a good deal of machinery that was used upon the claim
that I have not enumerated; just the larger items, were all that was
called for. There were some items of machinery that were simply
taken over to another claim to be returned. Those items are not
charged on here at all but were transferred over to some of the other
claims. They were taken over there as a matter of protection. This
403 does not contain the other hoists and boilers, pump and
buckets and so forth. I stated one boiler, one engine, a self-
dumper and pump and buckets on this list I believe, and
some few minor items. I don't know anything about the matter of
other machinery being removed. I don't know anything about it
after the machinery came in. I only know what I was told that
some of the machinery they were not using when the mine was
shut down, as a matter of precaution, was removed. There is one
engine charged. There were not other boilers, engines, hoists,
buckets and apparatus that were not charged at all, not according
to the record on the books. In fact, all of the other items of
machinery and things of that character that Mr. Murane called for
are carried in another book. Of course, fittings and tools and that
sort of thing, we would call them the small items that are not
carried in this book at all. I mean fittings such as were used in
operating that work out there, used in the regular work of mining.
The total amount of the items of expense I have here is seventeen
hundred and twenty-one dollars and fifty cents.

(Questions by Mr. GILMORE:)

The WITNESS (continuing): That is not two thousand dollars'
worth of machinery shown on these books. There is another book.

Whereupon Mr. E. GRIMM, a witness produced on behalf
404 of the plaintiff, in rebuttal, having been duly sworn, testified
as follows:

(Questions by Mr. GILMORE):

The WITNESS: My name is E. Grimm; at the present time I am the principal of the Nome Public School; I held a professorship in the State Agricultural College in Oregon for about seven years, at Corvallis. I was instructor of agriculture and the relative studies of chemistry and botany; the sciences. I am also an attorney of this bar and of the Oregon bar. I have taken a legal education as well as a collegiate. By reason of my professional duties I have examined a great many writings, not in a critical way for the purpose of determining their correctness or anything of that kind, but I of course have a great many writings come under *by* observation. I have examined a great many writings, not very extensive, perhaps, very extensive communications, I should say. I doubt whether I am qualified to give an expert opinion. I was at one time director in the Government Experiment Station, and received a great many communications, practically by the bushel; a great deal written; In Oregon. I have not begun my duties as principal of the Nome school as yet, not until school begins next month. As principal, in examinations, I am supposed to look over their papers more or less. When I was a professor at Corvallis, I examined the examination writings of a great many students.

405 Question. Now, Professor, I offer you some exhibits here for your inspection and to make an examination of them preliminary to my question. Here is Plaintiff's Exhibit No. 1. Your attention is directed to the discoloration here in the instrument which you will be required to pass upon. I would like you to examine that closely, if you will, and so that you will be able to understand my question, I will state that this part here, in words "one-half" and in figures " $\frac{1}{2}$ "; the same part here in this instrument which I next hand you, Defendants' Exhibit "B," which is admitted to be in the same handwriting, as the instrument which you hold in your hand, Plaintiff's Exhibit No. 1; also Defendants' Exhibit "A"—

Mr. ORTON: Defendants object to the question being propounded by plaintiff's counsel for the reason that the witness has not as yet shown the proper qualification to testify as an expert; he has not shown himself to be an expert and it is taking up unnecessary time to propound these questions until such qualifications are shown.

The COURT: I think you had better qualify him a little further, if you can.

The WITNESS (continuing): I hardly think, as an attorney, I have had occasion to examine papers to see whether they were genuine or false; so in as important a matter as this before me, if there was any question in particular as to the signature to a writing I have not made an examination of writings in instruments or papers for the purpose of seeing who wrote them, to determine who
406 wrote them where the signature was absent; I recall nothing of that kind in my experience. I have had experience in the

examination of numbers of papers. I don't recall at any time in any of my work that I have ever been called upon to make any nice distinctions as to whether they were genuine or not. I don't mean that often in my own work where I would be able to say that I was able to decide upon a point, or determine from my own information even that there had been a forgery, or anything of that sort, is what I meant to answer. I have made a study of handwriting for a good many years. I have not read books, works upon the subject, essays, not particularly. In my connection with the education of higher classes, I have had to examine a great many essays written by the students, however, and from that experience in that line, have passed upon a great many writings. I can't say that I have ever read essays on the subject of handwriting. I have examined the first instrument you passed to me for the purpose of comparing the writing; I have examined the photographs as well; I have seen them before. I have compared them for the purpose of distinguishing whether or not certain writings were written by the same party.

I stated that I was a teacher of chemistry in the State Agricultural College of Oregon, and I claim to be somewhat familiar with it. I have made a study of the subject. I have had more or less experience with acids; have seen their effects upon paper. I
407 taught chemistry here in the schools in Nome; that was one of my branches.

Question. I now hand you Plaintiff's Exhibit No. 1. You will notice the discoloration there, and also for reference, two photographs, to which I direct your attention, now hanging on the wall. You can either have them taken down off the wall or go over to them and examine them before I ask you any further question. Have you seen them now?

The WITNESS (continuing): I have not carefully examined them; no. I have seen them before to-day I examined them very casually.

Question. From your examination of Plaintiff's Exhibit No. 1, which you hold in your hand, Professor, are you able to state whether more than one erasure has ever been made by an acid there?

Mr. ORTON: You mean by that whether acid has been applied more than once.

The WITNESS: I understand you.

Mr. ORTON: We object to the question on the grounds of its being irrelevant, incompetent and immaterial, and the witness has not shown himself competent to testify to that fact as yet.

The COURT: I think he is qualified, but you may examine him further if you wish.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): In my opinion, there has been but one. Only one application of the acid—there may have been more than one application of the acid, but I would think that there
408 has been but one writing attempted to be removed by the chemical. One erasure.

Question. Now just look at the photo I show you, Defendants' Ex-

hibit "L" and Plaintiff's Exhibit No. 14; also take Plaintiff's Exhibit No. 15; Defendants' Exhibit "K," and examine that part of the instrument which shows a discoloration—just turn it around towards the jury, also. Now, referring to that part of the discoloration below the letter "o"—beneath the letter "o" in the word "one," which I wish you to make an examination of, and state to the jury whether or not there is more than one line shown there?

Answer. There appears to be two.

Q. Then can you explain, referring now to the one—referring to the apparent line here on the right hand side, can you explain to the jury what makes that on that deed, what caused that in your opinion. That is the line Mr. Fink discovered. Can you state what, in your opinion, caused that second line?

A. Let me see it in the original paper.

Mr. ORTON: I suppose that it was the photographer that caused the line to be there. I don't think that a proper subject of expert testimony, and object to it on the grounds that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

409 Q. Can you state what put that line on there?

Mr. ORTON: Objected to as irrelevant, incompetent and immaterial, and not a proper subject for expert testimony.

The Court: Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

A. The lines there are undoubtedly caused by the same thing that caused the line—that caused the impression of a line underneath the "one-half"; it is an iron stain caused by a mark being there, or else being carried by the decomposition of the ink; it may have been carried by the moisture, or either cause may have made an ink mark there. It is not the result of an ink stain; it may have been carried by the pen, or it may have been carried in solution through the paper.

Q. Could have been carried by the acid?

Mr. ORTON: Objected to on behalf of the defendants, that it is leading. Also immaterial and incompetent, and not a proper subject for expert testimony.

The Court: Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

A. To be exact in words, those marks were carried by the ink while in solution with an acid while the acid itself does not
410 contain any matter to cause a stain, perhaps of itself, yet the stains are caused by the decomposition of the ink in the chemical compound which comes in contact with the ink, the chem-

icals which are applied. The chemicals themselves which are applied practically carry no stains; the stain comes by the chemical changes in an ink, by the decomposition of the iron in the ink, it causes the reddish brown stain, the peroxide of iron.

Q. The iron is an element of the ink?

A. It is an element of all inks that we usually use; whether or not we have aniline inks or not; there is usually a mixture of water in all aniline inks, but iron composes most all of the inks in use, aniline as well as other inks.

Q. Now, referring to the distinctness of the line, the line which I directed your attention to particularly, can you state whether that line shows there, when that line was made with reference to the changed deed, when the discoloration of the acid was applied?

Mr. ORTON: Objected to as incompetent, irrelevant and immaterial, and not a proper subject for expert testimony, and also because he has not yet qualified to answer as to the age of stains.

The COURT: Overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

A. It seems to be without the discoloration. Along the border of the discoloration.

411 The WITNESS (continuing): Taking the other photograph, No. 14, I think it is as plainly visible on that as on this one; with reference to the outer edge of the acid discoloration; it seems to extend along the outer edge of the discoloration.

Question. Are you able to tell, from an examination of these instruments, when the acid was applied; in other words, the age of this discoloration?

Mr. ORTON: Same objections.

The COURT: Overruled; he can answer that by yes or no.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Answer. No, I don't think I could attempt to do that.

The WITNESS (continuing): Examining the original Exhibit No. 1, and these photos, I would not think that the brackets or parentheses enclosing the words and figures "one-half" have been removed by acids; I think they have been removed. I think that acids or some chemical has been applied to that upper portion of the brackets. I have no interest whatever in this lawsuit.

Cross-examination.

(Questions by Mr. ORTON:)

(Paper handed witness.)

The WITNESS: Looking at the piece of paper which you hand me, I see no appearance there of an ink mark on that, but I see where probably there has been some kind of a liquid has been applied to that paper. I do not see the appearance of any acids. I see no appearance of any iron stain from the ink or solution.

412

tion.

Mr. ORTON: I will just ask to have this paper marked as an exhibit on behalf of the defendants for identification.

(Paper referred to marked for identification Defendants' Exhibit "N.")

The WITNESS (continuing): I have not had much experience in seeing or removing stains from paper by chemicals. I have had none whatever.

Mr. ORTON: Now, I move to strike out all the testimony of this witness; it seems that he never has had any experience whatever with having removed ink stains from paper at all.

The COURT: Motion overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I never tried to do it myself. I don't know particularly much about it, no, I know about ink, and of course, in the general study of chemistry, I have a knowledge of the elements generally of inks. I understand the various elements. I don't know that there are any chemicals which will absolutely take out all of the writing with ink from paper. I will have to modify that. If, after the ink has had time to become thoroughly oxidized, which it is intended that ink should, especially inks with iron
413 coloring, red, blue, black—they are only partially oxidized in the bottle, when applied to the paper then they are what we call oxidized, or what we call protoxide of iron, which is soluble, very soluble, much more so than peroxide, and if they have been upon the paper any considerable length of time, it would be, it could not be extracted except with great difficulty, and it would be almost impossible to extract them after they have reached the peroxide state, without leaving some stain or line on the paper, and the longer they stood upon the paper the more it becomes what we call the basic point; which is more soluble. I have practically no knowledge or experience as to what chemicals are used in erasing ink marks. I think I know about what chemicals are used, but I have never heard exactly what they are. I think there are chemicals which will take out this peroxide of iron. You can remove peroxide of iron, also, but what I said was with reference to removing all traces of it from the paper. I think it would also probably destroy the texture of the paper. The texture of this paper which you have shown me is not entirely destroyed. I cannot see any signs on this paper where the gloss has been destroyed, or any signs of this peroxide of iron, with the naked eye, if there are any. I will take the glass if there is one at hand. (Glass produced.) There is one spot only here where there seems to be the remains of a letter, where the ground shows some grain of discoloration. Here (indicating)
414 I don't detect any place except that line. It can be seen with the naked eye. I don't know what chemicals were used in removing the writing from Plaintiff's Exhibit No. 1. I only judge from what they usually use. They usually use an alkali as a base in all their ink erasers, I should judge, and then an acid to

dissolve it, say muriatic or hydrochloric acid, or perhaps, oxalic acid, I am not familiar with the exact compound; at any rate it is an organic acid, which will readily dissolve the alkali base. I really don't know the process; I should judge something of the kind; putting on the alkali first, then putting the acid on so that it kind of neutralizes the compound. Something to act right directly on the oxide of iron, reducing it to another form of compound and reduce it to a soluble state, and probably then supply the acid. If it were possible to remove the ink writing entirely, one could write right over that; then remove the second writing, and you would not be able to tell whether that were done once or twice, if it were possible to obliterate every trace of the writing, yes, sir. You could write right on the obliteration the second time, right over it. If you could obliterate it the first time I should think you could the second also.

Question. Now, examine this paper (Ex. "N") right about here, if you can. If it should appear that right about that point on this paper, there had been the words—some words written there somewhere, the words "three-quarters," and if it had been entirely obliterated by chemicals, if it should appear ever to have been there and the whole thing was entirely obliterated, you could write
 415 over there again, and that second writing entirely obliterated also, if you wished, could you not?

Answer. Yes, I should think you could write over several times, if you obliterated it while the ink was fresh.

The WITNESS (continuing): If you could obliterate the first writing entirely, you could obliterate the second one entirely also, if you wished; so far as I know you could. I am not able to see any number on here; I am not able to detect anything on there at all; I think that is completely obliterated. That may not have been written with an iron ink you know. There is nothing whatsoever there that I can detect. I know what Inman's writing ink is. It would be harder to remove it than any other ink, I should think; it is very seldom used. I have no idea what it is but it is a very dry ink. I should think it contained a great deal of oxide. With two kinds of ink on that paper at once, where the changes are, where a different ink were used, or the same kind of ink, in my opinion it would make a difference; but my opinion might not be worth any more than anyone else's on that subject, but I think if it were the same kind of ink it would be easier to entirely obliterate. I know nothing about it, however, because I do not know what the different formulae are. Taking a general view of the instrument, I should say that it was written there along about the same time as the other, that is, it would appear so to me. The writing looks about the
 416 same age (referring to Exhibit No. 1). Looking at this paper, I see that the words "one-quarter" are entirely obliterated. I suppose that was obliterated on that paper by some process by which they have separated the precipitate of iron out of the ink, by whatever precipitate was used. The alkali might be applied before the acid was put on. I see certain spots about there on that paper where the words "one-quarter" remain. I see a little trace of coloring in here now; there is some slight coloration in here

(indicating). Yes, there is some discoloration, I can see it quite distinctly right here, indicating).

Mr. ORTON: I would like to have this paper marked for identification.

(Paper referred to marked for identification only, Defendants' Exhibit "M.")

The WITNESS (continuing): Referring to the words "one-quarter" and this line; that line could have been there before the acid was put there; now by putting on the acid it is approximately entirely obliterated, anyway it appears so to me. It would have to be done with extreme nicety to apply this preparation here again so that it would appear that all was not obliterated, but that a portion of the former writing would remain. I think it might possibly be done, but it is very impracticable, I should think. I presume that it could be done under very favorable circumstances. This shows no writing at this time (Ex. "N").

Question. And if done in the manner I have just suggested, then it would show that there had been some writing before on this
417 Exhibit "N" for identification. You think it could be done with nicety, of course, but that it could be done and not entirely obliterated?

Answer. You must understand, Mr. Orton, that that would have to be determined entirely by the length of time the ink had been upon the paper.

Question. Yes, there are those two things that will have to be shown. But if it were shown that these writings were upon there a considerable length of time, and that they were written with the same kind of ink—then you think with nice technical skill, it could be done?

Mr. GILMORE: Objected to as assuming something not in evidence.

The COURT: Objection sustained; you must not go too much into the remote future, Mr. Orton.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. Well, if it were shown to have been written upon there only last evening?

Mr. GILMORE: Same objection.

The COURT: Objection sustained; that is to be proven before you can ask these questions.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. Well, if it were shown to have been written upon there only last evening?

Mr. GILMORE: Same objection.

The COURT: Objection sustained; that is to be proven before you can ask these questions.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. If the ink has been entirely obliterated or removed here then that has been done with extreme nicety, has it?

418 Answer. Not necessarily, but it might be possible that it was written upon the paper, and the chemicals applied immediately upon the paper, however, I should think that there would be no necessity for any particular nicety about that at all, if that were the case, but if the ink remains any length of time, it could not be removed at all, in my opinion, that is, all of it could not be, without leaving any traces of the ink whatever upon the paper.

Q. Well, how about this one (Ex. "O")?

A. In what regard to you refer to?

Q. Can you see any traces of letters on there; any place, in your opinion where the words "one-quarter" may have been?

A. I cannot make out any letters, but there is a faint coloration; I see some faint coloration there now.

The WITNESS (continuing): It might possibly be the faint line that I see there. That is the line that I located before, that I said might possibly be dirt; I did not say what it looked like. That might possibly be dirt; it would so appear to me, but I am unable to say from my own knowledge what it is. The only reason that I made that statement that it would be difficult to remove the stain, is that if the ink had been upon the paper for a considerable length of time before it changes into an oxide which would be difficult to remove; it was upon that basis that I made this statement that it would be difficult to remove the stain under those conditions. I could not say if it could be possible to completely obliterate upon this particular paper anything which had been written there with ink at all.

419 Q. That is what I am getting at with this. Now, just try this once, Professor; I want you to see what you can do with it. Now, if there was an alkali upon that paper, what chemical effect does it have on the iron in the ink?

A. Well, before I could answer that question, I would first have to make a study of it; if there is no, what you call alkali or iron in the ink—

The WITNESS (continuing): I said there was iron in all inks; that the main element in writing inks was iron. The effect upon the iron in the inks is the oxidation of the iron. The iron forms the coloring matter in the inks. The action of the alkali upon the iron in the ink, when first placed upon the paper upon the ink, if the ink has not been exposed, if it has been properly protected, it would form a protoxide of iron. It would form a protoxide of iron, if it were very moist and had not been allowed to become solid, remained moist and protected, it would be soluble still and would form protoxide. It would be protoxide after the alkali was placed upon the ink. After you put on the alkali the chemical basis would be about the same—I don't, however, understand enough about the chemical composite of the ink—you ask me a question and without knowing the kind of ink. I am unable to give an answer that seems to me satisfactory; I would rather know more about the composite of the ink. I cannot answer that. I can tell the particular stage of the compound of the iron on that. It has reached the stage, chemically speaking, the ink has reached

the stage of a tannate-peroxide of iron. That is the stage which produces this discoloration. I am speaking about the ink as compared with that which has not been chemically treated at all; that is a compound of tannate and peroxide—in other words, it is the same. When you add the iron, a compound of the two. An application of a caustic alkali or salt, it reaches the stage commonly called an alkaloid—a change first comes about to some extent, which is called the hydrochloric or basic salt, which chemical change it would assume upon the paper, and without any other chemicals would reach a point where it would be what we call hydrochlorate, and soluble. You cannot segregate it and give an explanation of the action upon that particular base, the iron, unless you have it segregated from the other matter in the compound. The iron is not all of the coloring matter in the ink.

Question. What other coloring matter is there in ink?

Mr. MURANE: That is objected to as immaterial, what coloring matter there is in the ink, if he knows; the ink used in this instance is all that is material in this case.

The COURT: Yes.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

421 The WITNESS (continuing): I don't know what particular compound there was in this ink. I know nothing about the distinctions whatever; that is up to you.

Question. What other coloring matter is there in that ink?

Answer. That is rather an indefinite ink, Mr. Orton, unless you have something to guide me by.

Question. No, it is not; it is perfectly definite. You told me there was other coloring matter in inks beside iron. Now, I want to know what they are. If you don't know, why that ends it—say so.

Answer. There are several substances enter into it to produce colors. There is tannic acid enters into them. Tannic acid forms a coloring upon white paper, that is, with iron. There is tannic acid, and what is called sulphate of iron are used. Then a compound is entered into with tannic acid combined with sulphate of iron, and then in its chemical form it is changed and it forms a detannate instead of a sulphate of iron. I think I stated before that there is iron in all inks in some form. When any of the four common alkalis are applied to ink, it changes into a compound of what we call in chemistry, a hydrostatic solution of iron. When an alkali is applied, it changes into what you might call a water—not exactly water—I am trying to make it plain so as to convey to you the idea. I am trying to convey the idea to the jury. You understand, before

422 we had hydro oxide, that is, a solution of oxide of iron; then by an application of an alkali, it is changed into another compound, until you find three or four different compounds. You might have a sesquioxide of iron. That is a reddish color that you find in a deposit of iron, rust, in fact, like iron rust. Then there is the protoxide, that is the lower oxide. I think that is the general form of protoxide, that is a redish color—where they are used,

a reddish brown color. The chemicals in this compound are the hydric compounds, by the analysis they have been reduced to water, that is, a liquid in which salt is the predominant ingredient—you can reduce it into any number of compounds but the salt basis is the main element. Of course it is very hard to get it down so that you can give it a name, because you can get it down indefinitely almost. The hydrogen and pro-hydrogen are very different, and so on. I may not have explained the matter fully enough, if I had given the matter some thought before coming here, I might possibly have made it plainer. The effect of the alkali upon the ink is that it is changed to a more soluble state; that is the "hydro" effect, the solution; I am talking about. I suppose that iodide of potassium is the kind of alkali they use; they must apply one of the principle of the four common alkalis. There are different kinds they could use. I have seen this Sanford's Ink Eraser on a good many occasions. I have used it. I do not know the formula. I would hardly be

able to tell by looking at these two bottles of Sanford's Ink Eraser which is the alkali and which is the acid and the kind they are. They seem to smell of carbolic—this one does. They do not smell more of a tannate than a carbolic, but there has been a mixture—they both smell more or less alike coming from the bottle anyway. They are both used at the same time—that is, both must be applied in order to obtain the results. I can detect the smell of muriatic acid or something like that, and also carbolic acid; there is a mixture; they might have been changed in the bottle. It is impossible to determine what kind of either alkali or acid is used without an analysis; it would be impossible for me to tell. I suppose that you first apply the alkali and then the chemical action takes place that I have described; I presume that is its action; I have stated what I thought would be the desired action; what would have to take place in the application of them. I do not know that that is the specific action which does take place in the application of this Sanford's Ink Eraser.

Question. Well, following these directions, and from what you have described, you first apply this alkali and then this chemical action takes place, and the coloring matter in the ink, when the alkali is applied forming the compound which you have mentioned, makes a reddish color, did you say?

Answer. Well, I don't know; with certain base it would.

Q. That is the alkali such as is used to eradicate ink stain. Then you apply an acid such as would be used to eradicate the stain made by the ink in compound with the alkali; now, what chemical action takes place?

A. Well, it likely will reduce it to a soluble state, instead of an insoluble basic salt as it was before. The alkali in conjunction reduces it to a soluble state, a solution with salt as a base, and then the acid might dissolve the salt, which may be taken up and washed out, and requires extreme action, even the best chemists are liable to have to make more than the one effort.

Q. Now, after you have got the iron in a soluble state, then the acid would be applied, a liquid also, would it not?

A. If it were soluble, then you have got to have a substance that leaves no trace; there are less traces left by a mixture that would leave less trace and would be again absorbed, absorb the oxygen by dissembling it into the form of a liquid oxide again.

The WITNESS (continuing): If you had successfully used a preparation which had done what I said it should do; after it got entirely dry it possibly could be applied a second time. I think possibly a liquid could be applied a second time. It is probably supposed to be a liquid, is it not? Supposing that one application of the liquid is made, and you let it get perfectly dry, and start all over again with the same process; I don't know whether it is possible to remove the other stains with it or not. Looking at this paper here ("O")

425 which you have just shown me, to see if the stain or line which I spoke of before has been entirely removed, I think there is a slight trace there—I don't know but I can see a couple of slight traces there. I think there is a slight trace there. Sesqui-oxide is three parts oxygen and two parts some other base. It is just the relative proportion of the two atoms, oxygen and some other base. The proportions in sesqui-oxide are two to three. It is spelled "sesqui-oxide." Detannate of iron is an organic compound—it would be extremely hard for me to write out the formula of detannate. I don't know whether I can write the formula for it or not. I can give you the formula for tannate and detannate; that is the compound without the insoluble—it is a very complicated formula—I don't know whether I could give it to you or not.

Redirect examination.

(Questions by Mr. MURANE:)

Take this original exhibit, Plaintiff's Exhibit No. 1; if it should be true that the words originally written in that instrument, within the discoloration there, were written in April, 1902, and if it should be true that the erased portion was written in May, 1906, would the acid remove the writing as easily or readily as though the ink had just been used.

Answer. It would not.

Q. It would not remove it so readily as if it were just applied?

A. No.

426 Recross-examination.

(Questions by Mr. ORTON:)

The WITNESS (continuing): I do not know when any of this was written. From a casual observation it all has the same general appearance. As to its age, if you look very closely there might be a change—I might change my opinion about that, but from a casual-general observation, it has very much the appearance that it was all written at the same time. Perhaps I should look it over more closely if you want me to give my opinion about it.

Re-redirect examination.

The WITNESS (continuing): And written by the same person too. Referring now to the words "one-half" and the figures " $\frac{1}{2}$," my opinion is that they were written by the same party who wrote the original instrument (Ex. No. 1). It appears to me that the same party who wrote the rest of the instrument wrote the portion contained within the brackets.

Re-recross-examination.

(Questions by Mr. COCHRAN:)

Question. It looks as if he had let his foot slip when he made that "2" within the bracket, as compared with the other "2's" in the remainder of the instrument, don't it?

Answer. I simply made a statement with regard to the general appearance of the instrument, that it was apparent to me that it was written by the same party who wrote the rest, with exception perhaps of the figure "2."

427 The WITNESS (continuing): I don't know whether it looks like his foot had slipped or not, Mr. Cochran. It would look to me like it was made by a different person to the one who made the other "2." That is my opinion. I say, that it would have the appearance to me. I do not know that I could go so strong as to say that that was written by a different man; that a different hand had written this "2" within the brackets than who made the other "2's" in the instrument; I said that it had the appearance of that to me. You and I used to be partners. We used to talk about how instruments were forged. I remember how we used to put in some of our winter evenings talking and discussing about those things. I forgot about that when I was trying to qualify as an expert. We also discussed putting in another instrument where it is copied. I remember our discussion upon those things, and the opinions I had about it then. If a man were trying to forge an instrument, he would try to make it appear similar. He would make it as similar as he could make it, I should think. The "2's" in this instrument, Exhibit No. 1, are very dissimilar. An individual would be somewhat skillful in imitating handwriting to attempt to imitate Mr. Whittren's handwriting, and he would be apt to go at it with considerable care in order to write in the " $\frac{1}{2}$ " here the same as Mr. Whittren had written it, if he was trying to imitate Mr. Whittren's handwriting. He would have to be a pretty good forger to imitate Mr. Whittren's handwriting in every respect. I don't know whether he
428 might let his foot slip when he got to this figure "2" here, but there is an apparent dissimilarity between the two figures, in my opinion.

Re-re-redirect examination.

(Questions by Mr. GILMORE:)

Question. Now, if he were trying to fill in with these letters or figures where a four had been originally with a " $\frac{1}{2}$," he might do

that purposely, might he not? He might make his "2" in that shape, might he not?

Mr. ORTON: That is objected to as not proper redirect examination, and because it is presuming something not in evidence. We have asked this one hypothetical question, and the counsel are confined to that one question. They brought the witness here as an expert chemist and qualified him, and then upon redirect expected to slip in an improper question—we beat them to it and let it go; then we ask this one hypothetical question, and when they come to cross-examine their own witness, they want to open up the whole field.

Mr. MURANE: We submitted to the ruling of the Court and asked the witness concerning the process used in erasing inks; that was all we asked him. They have opened up the examination by asking how to detect forgeries. Now, we certainly think we have the right to cross-examine him upon testimony which they have brought out themselves.

429 Mr. ORTON: It is objected to on the grounds that it is irrelevant and incompetent, and assumes something not shown in the evidence as yet.

The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Q. If a man were trying to fill up a space with three letters where four had originally been, he might purposely write them in in that way, the figure two as well as the others, might he not?

A. Well, that might be ground for it, if that were on the line with the four.

Q. If the "2," the lines of the "2" were traced over the lines of the "4"?

A. Yes, that might be—it might have been done for that purpose.

Whereupon Mr. C. G. COWDEN, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

(Questions by Mr. MURANE:)

The WITNESS: My name is C. G. Cowden; I am cashier of the Miners & Merchants Bank. I have been in the banking business about sixteen years. During that time I have been employed in Tacoma and Nome. I have been connected with the National Bank of Commerce in Tacoma, and with the Alaska Banking & Safe Deposit Company and the Miners & Merchants Bank of Nome. I

430 was Cashier of the Alaska Banking & Safe Deposit Company. I was paying teller with the National Bank of Commerce, in Tacoma. In the various banks that I have been connected with and the various positions I have held, I have had occasion to make a study of handwriting. During the sixteen years that I have held those positions, the greater portion of that time, I have made a study of handwriting.

Question. Mr. Cowden, I now hand you a deed, a document marked Plaintiff's Exhibit No. 1, in this case. I will ask you to

examine that document, and will state to you that it is admitted that the body of that instrument was written by Mr. J. Potter Whittren with the exception of the words "one-half" in writing and the figures " $\frac{1}{2}$ " within the brackets. I also hand you another exhibit marked Defendants' Exhibit "B," being a deed which is also admitted to be in the handwriting of Mr. Whittren, the body of it, and is also admitted to have been written at the same time that Plaintiff's Exhibit No. 1 was; I also hand you an instrument which has been proved, and admitted to be in the handwriting of Mr. Whittren—also a letter marked Plaintiff's Exhibit No. 5, which is admitted to be in the handwriting of Mr. Whittren, written in 1906. I would like for you to compare all of those instruments with reference to the words "one-half" and the figures " $\frac{1}{2}$ "—the written words first, "one-half," in the first document handed you, and at the same time, I will call your attention to two photographs hanging upon the wall, which are exhibits in the case and marked Defendants' Exhibit "K" 431 and Plaintiff's Exhibit No. 15, which is an enlarged photograph made of a portion of the document first handed you, marked Plaintiff's Exhibit No. 1, only made on a larger scale. Examine all of them together; then I want you to be ready to pass your opinion upon the handwriting before I ask you another question. State whether or not, in your opinion, the words "one-half" as written in Exhibit No. 1, in the brackets, and the figures also " $\frac{1}{2}$ " within the brackets, were written by the same person who wrote the rest of that instrument?

Answer. As far as the written words "one-half" are concerned, I believe they were; in the figures " $\frac{1}{2}$ " there is a difference however.

Q. In whose handwriting would you say were the words as written "one-half" upon that instrument Plaintiff's Exhibit No. 1?

A. In the same writing as the rest of the document.

Q. I now call your attention particularly to this Exhibit "L" and No. 14, to that portion where the discoloration appears, and state if you can testify whether or not the words "one-half" was written by the same hand as the rest of the instrument, and ask you to examine it closely, and state if you can distinguish any word back of the word one.

A. Yes, sir.

The WITNESS (continuing): I see very plainly there an "h" and an "r" and two "e's," and there is something before there which I can't make out. It is faint, but it has the appearance of a 432 "t." I would be then the word "three." The word "three" appears to be in the same handwriting as the rest of the document.

Cross-examination:

The WITNESS (continuing): I know of no set rules or rule that I could go by in detecting whether or not an instrument is genuine handwriting of the party purporting to have executed the instrument, or whether or not it is forged. No set, certain rules; no, sir. I have talked with Mr. Collier somewhat since he was a witness in this case, and what he testified in court concerning his opinions with

regard to these handwritings. I adopt about the same rules as all of the experts have with reference to becoming familiar with a person's handwriting, in the same way; that is to say, by seeing a man's handwriting and becoming familiar with it. I recognize the handwriting somewhat as you recognize anyone or anything by becoming familiar with it. My experience has been in the banking business; where I have to examine signatures especially; signatures to checks has been principally my way, yes, sir. There is no doubt you are less liable to mistake a man's signature than you are in their ordinary handwriting; his signature is usually very different from other portions of his handwriting; there is no question about that. My opinion is that the words "one-half" in this instrument, Plaintiff's Exhibit No. 1, is in the same handwriting as the balance of the instrument. It certainly is a clever forgery if it is
433 not in the same handwriting. No doubt a person intending to commit a forgery would endeavor to make it appear in the same handwriting so that it would not be easily detected. I am not testifying that it was not written by somebody else, of course not. I said in my opinion it appeared to be written by the same hand; that is the way it appears to me. I am not stating as to that. In detecting the genuineness or non-genuineness of a writing, it is possible there are certain set rules that are used by persons skilled in the practice, as to the character of a person's hand, aside from just the general appearance. I don't know, I never studied the matter of the system or set rules. I don't know any system of set rules. Taking the first line of Exhibit "I," now, there is a very decided resemblance between that "o," and all the other "o's" you may find in the word "one," in the rest of the portion of this instrument.

Question. Now, upon making a very minute examination, you will find that the lines which are in the "o" in the word "one," the first one comes down—extends down to the base line, and past the other part of the "o" and through the whole part of the "o"?

Answer. Where that distance is, it is different, no doubt.

The WITNESS (continuing): That extends almost wholly beneath the base line, while this letter up here extends considerably, the lower portion, above the base line. I don't think that that
434 would be an indication to an expert, in the detection of a forgery. I do not think the "o's" are particularly different—in that regard perhaps, but not particularly to my mind different. That is a question that I cannot answer whether that is an indication of a forgery of that one letter. You are speaking of the dissimilarity there that I think would occur in any handwriting; that will occur in your handwriting; you take two letters made by one hand and you will find points where they will be dissimilar notwithstanding there might be the same general characteristics there. Take the letter "h" in the word "whole" in the third line, and comparing it with the "h" in the word "half" in this instrument, and there is a decided similarity there. There is a similarity there in the whole loop; there might be more of a loop in one place than in the other. The bottom "h" is hardly made with an angle, I

should say; it has more of a loop than the lower one; it might be said to be a slight slant where the letter curves upwards. I should say there was a shading in the loop above. The upper "h" has a more decided loop. It has a heavier shading here. The loop seems to be made with a swing or loop of the pen, I should say. The pen could not have been lifted, in making the loop there, because it seems to be all joined—continued together; it seems that it was made with a more decided loop, is what I would call it particularly. It might be said to have a heavier shade here. I hadn't noticed the two "h's" one has a heavier loop than the other. As a matter
435 of fact, this upper "h" has no loop at all. It is some dissimilarity in those two letters. I stated that a dissimilarity of that nature in making the same letter twice, that it was likely to occur in any one's handwriting, but that it was not a sufficient indication, to my mind, to indicate that they were not made by the same person, that alone. Between this "h" and this "h" there is one similarity, but however dissimilar they might be, take a single letter that way; I do not believe that it would be an indication that they were not made by the same person. I do not think that a dissimilarity so marked, when you take into account when comparing the handwriting that it would be an indication that it was not made by the same hand. I see a decided similarity in the whole two letters. I have not said that this word "one" was written by the same hand that wrote the body of the instrument. I had no idea of making such a statement. Recurring to the upper "h" I notice an angle here at the bottom of the first downward stroke, an acute direct angle, coming back and forming this straight downward stroke. I notice that this "h" here has not so decided an angle as this one (indicating). It is a curve. The question of angles and curves is one of the material features of writing by which handwriting experts detect the bogus and spurious signatures or handwriting. All of those things are taken into consideration. It is a material thing to be taken into consideration in detecting forgeries. I have never read any authorities upon the subject. You first go
436 into the general appearance of the whole thing, and in detecting forgeries. I suppose you would go even farther than that. You usually detect a forgery then and there, in my experience, however, without going any farther. I suppose the general question of the handwriting would be looked into, and it would take a person who had a general knowledge of the question to detect the thing if it were detected at all. I have never gone into the question of detecting forgeries myself. I don't know much about the peculiarities of handwritings myself, but I have been examining writings for quite a number of years and have examined a good many different handwritings in that number of years. A part of my business has been the examination of handwriting. I don't know what other features of handwriting I would go by in order to determine the bogus from the genuine, other than the common knowledge of one's writing and how they usually write. I have never tried that myself. I think I would know a piece of writing, if I have ever seen their writing enough to make some com-

parison, but I have never made any special study of the subject, nor have I said that I absolutely know; all I have said is that I have had a good deal to do with handwriting in my business by which I would know. By a matter of experience. I decipher the genuine from the spurious by the general characteristics used in the writing the whole thing. Nothing else but general characteristics, usually.

I would just examine a man's handwriting and try to decipher what were the characteristics he used in his hand in order to determine in each case what they were. As to the method I use, I do not know anything more than I have told you. For myself, if I have made up my mind to pass upon a handwriting, for instance, if there was a question raised in my mind, I would examine the writing very minutely, examine it with reference to seeing if there was anything about it which was similar or dissimilar to the man's writing generally; there are a hundred ways; I should take into consideration those things which you have just suggested, curves and loops and angles and those things. I would not exactly determine whether it was genuine or spurious by their similarity or dissimilarity. First, in telling whether a writing was genuine or spurious, I would look to the general characteristics of the writing. I am a brother-in-law of Mr. Gilmore's.

(Question by Mr. GILMORE:)

The WITNESS (continuing): That has not got anything to do with my testimony. Mr. Gilmore did not ask me to testify in this case, nor did he have anything to do with my testifying in this case.

J. J. CHAMBERS, recalled by the plaintiff in rebuttal, testified as follows:

(Questions by Mr. MURANE:)

The WITNESS: I heard Mr. Whittren's testimony in this case. I never told Mr. Whittren that I had or would give up and abandon my interest in the Bon Voyage Mining Claim. Mr. Whittren did not ever demand fifty dollars from me for assessment work upon the Bon Voyage claim in 1903 or '4. I did not tell him that I did not have the money and refuse to pay it. I did not in May, 1906, or at any other time, tell Mr. Whittren that I had changed the deed, Plaintiff's Exhibit No. 1, in this case, with chemicals or otherwise. No conversation took place on May 26th, 1906, or at any other time, when he threatened to prosecute me or expose me for having, as he alleged, changed this deed; no such conversation ever took place. There was never any occasion for such a conversation. I never at any time or place had any understanding with Mr. Whittren or agreement that he should pay me one-quarter of the proceeds of the Bon Voyage claim or any other claim for the benefit of my wife. There was never any such conversation as he related about going out to call upon my wife. There was never any occasion for such a conversation. I have not since April, 1902, made or caused to be made, or permitted to be made,

any change of any kind or character in the deed in question in this case, being Plaintiff's Exhibit No. 1, other than that stated by me as being made by mutual consent between me and Whittren on May 24th, 1906. I have not, since the injunction proceedings in October, 1906, made or caused to be made, or permitted to be made any change whatsoever in the deed, at that time or up to the present date. I prepared a telegram in May, 1906, to be sent to 'Gener Chilberg. W. V. Rinehart, Jr., was to send the telegram after I had prepared it. The telegram which was introduced in
 439 evidence is not the same as it was. The date of May 26, 1906, was not written by me, and the two lines drawn across the word Whittren have been put there since I wrote it, and the word "Andrew" in front of the word "Eadie" is written by some one else, and the word "York" in the body of the telegram, and also the signature of "J. Potter Whittren" is not my signature, of course, in the telegram Plaintiff's Exhibit No. 13, in this case. The telegram I wrote out read: "Lease one year satisfactory to Whittren; consult Eadie, partner, Nome." The telegram was written that way because W. V. Rinehart, Jr., knew that I was the owner of a half interest in this claim, he had seen the deed, and he was acting as the representative of 'Gener Chilberg, and to attempt to telegraph him under my signature and explain that I owned half interest in it would require a long telegram, and in order to make the explanation, the word "Whittren" was put in also to save expense and save complications, and explanations, and so we put it in that way to curtail the number of words that we should use in the telegram, because Rinehart knew that I was an owner in the claim at that time.

Question. You heard the testimony of Mr. Whittren that you had no right to any interest in the Bon Voyage claim, 5½ on Little Creek and the Rocky Bench, except that you had put up the recording fees. Now, will you state to the jury how those claims
 440 came to be located by Mr. Whittren, and what interest, if any, you were to have in them?

Answer. In the summer of 1901, a man by the name of Waldron, who came over the trail with me from Circle City, in 1896, came into my office and told me that he wanted to go outside to see his mother, who lived in the New England States somewhere; that he had not heard from her for five years, and that in the past few days he had taken a notion to go out to see her; that he had only a small amount of money, no more than enough to take him home——

Mr. COCHRAN: This is objected to as wholly irrelevant and immaterial and hearsay.

Question. Just never mind the details, Doctor, just go ahead and tell how Mr. Whittren came to stake those claims.

The WITNESS (continuing): At that time Mr. Waldron owed me somewhere about three hundred dollars——

Mr. ORTON: We object to this as irrelevant and simply burdening the record with a whole lot of immaterial matter; I don't see what this has to do with these claims.

The COURT: Objection overruled; this is leading up, no doubt, but don't go into too much detail; get down to the point.

The WITNESS (continuing): and Waldron said if he paid me back the three hundred dollars that he would not have money enough to go home and see his old mother. I told Mr. Waldron for him to go ahead and possibly when he got outside he could send me back the money, or perhaps not, but for him to go if he wanted so much to go. A few days later, or some time after, I don't know
441 just the length of time, he came into the office again and he had a bunch of location notices of property he had located; he threw them down on the desk and he said, "I don't know whether they are worth a cent or a million." I believe that is just the expression he used, but he said for me to take those location notices, anyway until he was able to send me the little he owed me, but he said he had never recorded the notices, and he said that I could do as I pleased with them; I could take them and he would give me a deed to them, or I could wait until the first of the year and relocate them, or do anything I wanted to with them. If you think they are worth re-locating the first of the year, all right, and I hope they are worth a million. He said he would go back down to where he was living and would be back again before he went out. I never saw Waldron afterward, but about the time he was to go outside, or just before, there were some men drowned down on the beach here, and some bodies washed ashore, and there was one man by the name of Waldron, so, because I never heard of him again or saw him, we supposed that one of them was Mr. Waldron. That fall, Whittren came down from the Port Clarence District, and as I was not familiar with the conditions around here, he gave him, just before the snow came on the ground in the fall, these location notices and sent him out to find the stakes of the "Gold Hill," Claim No. 2" located by Mr. Waldron, and the stakes of No. 5½ on Little Creek, all of which
442 had been located that summer by Mr. Waldron, and so he did so, and a day or so before the 1st of January, 1902, we consulted over the names that we would call these three claims, calling the one No. 2. and 5½, and when we came to the last one I suggested that we call one the name of Waldron, out of respect for the friend of mine, Mr. Waldron, who at that time we supposed had been drowned down the coast. Instead of that Mr. Whittren suggested that we call the claim the "Bon Voyage," wishing him a good voyage to the next world. We talked the names all over and finally we agreed that it should be called the Bon Voyage. That is the way the claim came to be named; that being the French word, I believe, meaning a good voyage. I am not "up" on French, however. I told Mr. Whittren that if he would go out and locate the Bon Voyage and the two other claims, that we would go in together and I would pay for the recording, and he agreed to do it.

Question. Now, explain to the jury how it happened that the deed apparently calls for one-half, while he claims that it was a deed for a quarter, which the contract with reference to these claims reads "one-half," and you now claim that the deed originally called for three-quarters; just explain that will you?

Answer. The contract of 1903, or the contract originally entered into?

Q. No, in 1906.

A. In the year 1900, in the summer of 1900, June or July, I have forgotten which month it was now, it was the agreement that we were to be equally interested in all the properties or claims located in the Port Clarence District, and the agreement that we had here in these locations that we were to be in conjunction, and we were to have a joint ownership and equally interested. I don't know whether that was the way it was expressed in the contract, but I know that that was the meaning, anyway, that we were to be equally interested in all properties we got in the country, and when Mr. Whittren came back from the Port Clarence district in 1902, he made a proposition that we should make a trade; I was to take the claims down here, because as I said, some might be good and another poor; I made him a counter-proposition for him to take a three-quarter interest in a number that he considered the best claims up there, and that I would take a three-quarter interest in the claims down here, and that contract was entered into and a deed drawn up, made out and signed; that I was to take a quarter for some of the claims—in some of the claims in the Bluestone, and that he was to take a quarter in these claims down here, and that was the way the deed was made out; and that is exactly the way the deeds came to be made out in that way.

The WITNESS (continuing): There was nothing said at that time about my giving a quarter interest up there in the Bluestone or the Port Clarence District for money due Whittren for assessment work; there was no conversation to that effect that he was to receive this quarter for assessment work due him from me upon those claims in the Port Clarence District. The way the memorandum introduced in evidence in this case, marked Defendants' Exhibit "D," came to be written by me was, after Whit came, and after the change had been made in the deed reducing it from a three-quarter interest to a one-half; Mr. Whittren telling me at that time that the claims were all in good condition up here, and that 5½ on Little Creek was well taken care of, by a party that he had at that time forgotten the name of, but that he was an honest Dutchman that was taking care of the fraction between 4 and 5 on Anvil Creek, and that the bench we had on the right limit of Dexter creek also was being well cared for and looked after by some man; that he was going up himself very soon, and he went into a lot of minor details which I don't bother myself to remember at the time, but I said to him: "Look here, Whit, you have been down in the State of California all winter and you don't know the conditions up there; I am told that the rich pay line runs across there, and in my opinion it crosses our Bon Voyage claim, the Bon Voyage claim being right in between Newton; we have been firm, true friends, been together a long time and now, I says," and I took out this memorandum, while I was taking out the leaf off my prescription blanks, "You had better investigate about those newspaper reports. I think you will find that this good pay runs across our claim, and if there is anything in it, why there is something for us both, and I will just make

you out a little memorandum; it would take too long to make out another deed, and this memorandum will be just as good, 445 and when I come up to Nome, if there is anything in it, I will make you out a deed, because I bet you that the pay runs up there, and if you will go out there when you get to Nome and get to work, and get Andrew Eadie to go ahead and locate the pay as he agreed to do before you gave him this deed to his quarter, look up the records and see what there is in that claim; straighten the records all out, and I think you will find out there is something in what claim, and if there ain't, well, we won't be any worse off," and with that I handed him this memorandum, which I had been writing, but he said that he didn't want the memorandum; that he had made a botch of it himself, and he did not want it; that it belonged to me, but I told him to take it, and we might both do pretty well out of the claim yet—"if there is anything in it, a quarter will be enough for both of us." He insisted that he didn't want to take it; that is, it was mine, and he had nothing coming out of it to him, and we talked around there for quite a few minutes about his taking it. Finally he took it. I told him there would be enough for the two of us to get a grubstake out of it yet, and then he took the memorandum and told me he would look after it as soon as he got to Nome, and would write me at once what there was in it, and keep me posted everything there was done. I told him the first thing to do was to get Andrew Eadie to locate the pay, as he had agreed to do. The only consideration for the memorandum was to see that Mr. Eadie was to locate the pay, and carry out his contract to locate the pay. The other claims but the Bon Voyage 446 were in good condition, being prospected and well looked after. Mr. Whittren agreed to carry out this agreement and see to it that Mr. Eadie located the pay on the Bon Voyage. I heard the testimony of Mr. Whittren. I heard also the testimony of Mr. Wheeler here the other day. I had a conversation with Mr. Wheeler, but no such conversation as he related.

Question. Did you tell any of these parties who have testified in regard to conversations, or anybody else, that you were the one who used the chemicals on this particular deed?

Mr. ORTON: Objected to as irrelevant and immaterial.

The COURT: Objection overruled.

To which ruling of the Court, the defendant- and each of them, then and there, excepted, which exceptions were allowed by the Court.

Answer. No, I never did.

Cross-examination.

(Questions by Mr. COCHRAN:)

The WITNESS (continuing): I have not the story written up. I have certainly never studied up any story. I don't need to in this case, Mr. Cochran. I don't know why I stopped the stenographer and asked her where I was when I was telling my story. The story is rather a long one and I wanted to get out all of the facts connected with it, but I didn't want to encumber the record. I suppose I could

have done so, but I supposed I was doing nothing wrong when
447 I asked to have her read where I was. It is not a fact that

I have my story all written out, and that I and my attorneys have had consultations and have made changes in my story, that I was to tell as this trial has proceeded every day. I have told you two or three times why I stopped the stenographer. I said that I had stopped the stenographer and had her read what I had stated—I told you that I didn't want to repeat what I had already stated; I simply stopped her so I would not repeat myself. I think I was on the Bon Voyage claim the first time in 1901, myself. By myself. I went over there, if I remember, right before the claim was located; I think I had been on the Bon Voyage claim before it was located by Mr. Whittren, that is, I know since then that I was out there before it was located by Mr. Whittren. I first learned about the Bon Voyage claim through Mr. Waldron—not where the Bon Voyage was situated, however; that I first learned through Mr. Whittren, after it was located, but the ground where it was afterwards located, I first learned of through Mr. Waldron. I always called him just Waldron. I don't know what his initials were; I don't know that I ever heard what his first name was; he was a cultivated gentleman and used to come into my office and sit and talk. I used to like to visit with him, the first winter he was here—I couldn't tell you what his first name was, though; I always just called him Mr. Waldron.

He was a very quiet appearing gentleman—We came in over
448 the Circle City trail together, way back in '96. He was a medium-sized man, a fine looking man; good appearance, but a very quiet appearing man—you might not be able to tell much about him by his clothes—he was never dressed up much when I saw him, but he was a man of about my height, I should think—he used to come into my office and we would talk together by the hour. I don't know where he lived. I never visited at his home. I don't know where he lived; he was down on his luck that first winter, as a good many men were. He was a clean sort of a man, one of the few men that I cared much about here that first winter. I couldn't say that we were intimate friends; we were friends and he came to my office frequently. I suppose I was his physician but I never called at his house to see him. I never had occasion to go to his house; I never knew where he lived. I think he had a dog team, and generally did freighting—I know that was what he did; the upper country—he had some shepherd dogs; had a shepherd dog team; I recollect, a shepherd leader, anyway, with quite a number of other "outside" dogs. He was quite a nice looking man. I have never seen him since he left here in 1901. I never heard of him or saw him after he left to go out that fall; but I have heard since that time that he was an American, although I thought him an Englishman at that time, and that he was married and had a wife and family living on a farm somewhere in the New England States—in New York, I believe, but I never heard from him directly, since he left
449 here in the fall of 1901. I didn't hear that he was drowned but there were some people drowned about that time, and from the fact that he didn't come back after he had said he would before he went to the outside, I thought from the description, and

the fact that he didn't come back to town, I supposed he was one of them. I entered into a contract with Mr. Whittren in 1900 that he was to go to the Port Clarence District and locate some claims. I never knew of it if Mr. Whittren had some machinery and stuff here that he brought in from the outside with him. I never knew of it if he had. I never knew he had any machinery. He had a common miner's outfit, a small outfit for prospecting. I never knew of any boiler. I never heard that he had a boiler—never heard him say that he had a boiler. He never said anything about having any machinery to me. I never knew that Mr. Whittren had any machinery of any kind. He was taking up to Port Clarence with him a small outfit when he was going up to locate some claims up there, going on a stampede, is what he was doing, so you know he didn't take much of an outfit to go on a stampede to the Blustone. He had grub enough to last him a month, probably. He had enough provisions probably to carry with him going on a stampede; you know what that means as well as I do. I did not give him that hundred dollars to take his outfit that he brought in from the outside; I supposed he used that in paying his expenses; when he came up here he landed here broke, and I know I suggested to him to go up
450 and locate some claims in the Port Clarence District. Jack Sullivan told me about some claims up there, and told me he thought it was going to be a good country to get some ground in and so I told Mr. Whittren that I thought, as he was doing nothing, that it would be a good plan for him to go up and try and get in on some ground, and so on account of my putting him up to it, he said he would go up there and try to locate some ground for the two of us, because I had loaned him money, and so forth, and he told me he would locate for the two of us there. He did go up to Port Clarence District. He stayed up there until the fall of 1901, and he located several claims, I understand, in his own name. He did not afterwards give me a deed for one-half. No deed for a one-half ever came to me for any claims in the Port Clarence District. He entered into a contract with me to give me a deed for one-half, and the interest which I was entitled to was a half interest in the claims which he had located in his own name. I think the claims in the Port Clarence District were located in 1900. In April, 1902, he gave me an interest, a deed to an interest in the Port Clarence claims; he executed a deed. I was up in the Port Clarence district; I have forgotten just when it was now. I was up there after they were located. I did not do any work up there. Mr. Whittren came down to Nome in the fall of 1901. I don't think he was down any time between the time he went up there in 1900 and the fall of 1901, not to my recollection. He came down sometime in the fall of 1901; I don't
451 know just the date. It was not so very late—about the close of navigation, I think. He stayed down here all that winter. For the location of these claims, I paid him more than this hundred dollars; I bought him provisions and advanced him money at different times. I advanced him money at different times. I don't remember now, of course, what they were, but I remember I sent him up a lot of provisions by the steward of the "Oregon"—I remember that it was on the "Oregon," because she was the last boat going up

after I heard from him, and I think it was five boxes of provisions that I sent up to him on the "Oregon," but I know I sent him up some provisions, and a number of expenses that I paid for him. I have no bills for the provisions that I sent up to Potter Whittren in the fall of 1900, I haven't anything to show any money that I sent up to him. If I remember right, Whittren sent down to me and I sent him some money at one time by a man by the name of Beechwood. I sent up some money one time in the winter time by a man by the name of Beechwood. Twenty dollars, I believe, it was. I can't say whether it was a twenty dollar gold piece or not; I don't remember that. Now, I sent him up some money in the winter of 1900, a twenty dollar gold piece by Beechwood. I don't remember of sending him any other money to Port Clarence. I don't think I have any letter that Mr. Whittren wrote me from the Port Clarence District. I don't think I have preserved all of the letters that Mr.

452 Whittren has written me with reference to the Bon Voyage claim. — don't think I have all the letters Mr. Whittren has written me on that or any other subject. I haven't got any letters from him from the Port Clarence District that I know of. I haven't got any letter showing that I sent him any money whatever to the Port Clarence District, and no receipts. I don't know that I have;—I might have even at that, if I went to rummaging over my old letters—I might find some. I am inclined to think that that twenty dollars is all the cash that I ever sent to Mr. Whittren up there. I am inclined to think that that is all the cash I ever sent him. I know a man by the name of Julius F. Thompson, an attorney of Teller. I remember Julius Thompson collecting some money for me he brought me down a copy of the claims I had up there, and telling me about that there was a good chance to re-locate some of them. He told me I had better file amended location notices and I sent this twenty dollars up there to pay for these amended location notices. As a matter of fact, this cash I have been telling you about was sent up there to pay for the amended location notices on those claims that were located up there for my benefit by Potter Whittren; and I guess for his benefit too. Well, there were some provisions sent up in addition to some I sent on the "Oregon" in the fall of 1900. I sent provisions to Mr. Whittren both on the "Oregon" and on the "Edith"; on both. That is my recollection of it. I have no 453 bill of lading or shipping receipt; he has all of them because I sent them to him. He has all the shipping receipts. I think I might find some letters or communications from J. Potter Whittren showing the receipt of provisions that I sent him up to the Port Clarence District; I think I might find some of them amongst some of the old letters if I had them here to look through them; I have never looked through to see whether I have or not; I haven't got them here with me if that is what you mean. It is a long time ago, 1900, almost seven years, but if I took the time to look for them, I think I might find some of the old letters. I have not got any of the letters from that time up here in Alaska with me, I don't think. I know there was a great batch of letters, but I don't know whether I have any of them amongst them or not.

Question. I want you to bring me a single letter you received

from Mr. Whittren acknowledging the receipt of either money or provisions from the Port Clarence District, aside from this twenty dollar gold piece that you sent him to pay for filing the amended location notices on these claims.

Answer. Yes.

The WITNESS (continuing): I think that after I had sent provisions, I received back from Mr. Whittren a communication stating that he had received the provisions I sent him. I think I might have some such communication among my old letters, but I don't think I could get them—I had a big stock of letters from Whittren that winter; I think I may have some of them. Some of the letters are lost, no doubt, and I don't know that I have got any.

454 I said that I might have some of them amongst the old letters at home; they might be among some of the old letters that were stuck away around the desk at home. I think I saw some of those old letters around there not long ago. I don't know if any of those communications happened to be saved or not. These communications started in in 1900. I had my office in Nome, then on Steadman Avenue. After several years I removed from there, yes, sir. I removed by offices and outfit from Nome after a time. I moved to Seattle, and also moved around to different places in Seattle. I have been east. With all that moving around I have preserved just the deeds, and the two letters that happened to be along with the deeds, they happened to be carried around with us; happened to be in some old trunks and just happened to be moved that way.

Question. So that all you have ever paid to Potter Whittren during the time that Mr. Whittren was in the Port Clarence district was this twenty dollars and these provisions you say you sent but don't have any bills or receipts to show for, to pay for filing amended locations on these claims?

Answer. I don't remember any other.

Q. Did you ever pay him for the assessment work in the Port Clarence District?

A. I paid Julius Thompson for attorney's fees with reference to these claims 13 and 14 above Hayden's Discovery on Gold Run, for matters that Mr. Whittren had asked advice about those

455 things in connection with those claims, and I sent to Julius

Thompson and consulted with him in reference to these claims so as to protect his interest, and I advised Mr. Whittren with regard to the same, and when Mr. Whittren came down and we came to make out the deed we figured the assessment work, the cost of the provisions I had sent him up, the money I had sent up and the attorney's fees I had paid and the money I had put up in the neighborhood of a thousand dollars, and so that was all taken into consideration when the bill of sale was made out, and we figured that that would just about amount to the cost of the assessment work—of course, we were not figuring on any lawsuit or anything of that kind then—I thought at that time that if there ever was a man that could be depended on, it was Mr. Whittren, and I

considered everything that Whittren did would be all right—I never thought of having this all put down in black and white.

Q. Now, do you mean to tell this jury that on some old wildcat claims up in the Kougarok that you paid Julius Thompson a thousand dollars for attorney's fees—that you paid him in the neighborhood of a thousand dollars attorney's fees? You don't mean to say that do you?

A. I didn't say I paid him a thousand dollars.

Q. How much did you pay him?

A. I don't know exactly, but I know I paid Julius Thompson between five and six hundred dollars.

456 Q. For consulting with Julius Thompson with reference to some wildcat claims that had been located by Mr. Whittren up in the Port Clarence district that at that time had no known value at all, some five or six hundred dollars?

A. Well, they were supposed to be very rich claims from what Mr. Whittren represented to me, he represented them to me to be very valuable; the most valuable claims in the country; why, some of them he figured were worth three or four hundred thousand dollars—none of them in fact less than fifty or sixty thousand. There was nothing to compare with them from his reports to me—I think in some of his letters he figured some of them up—some of them he figured up to five hundred thousand.

The WITNESS (continuing): He told me to go and consult with Julius Thompson. I think I have got that letter—I think I have got some of those letters yet. It may take me some time to find that letter; I would have to look through a whole batch of letters, and then I might not find any. The information that Mr. Whittren wanted with reference to these claims in the Bluestone country that I consulted with Julius Thompson about, was some information, some question concerning the location notices, or something; and this time when Beechwood was down here, and I sent him up a little memorandum of what Mr. Thompson had told me to tell him and outlining the whole proposition of what Julius Thompson had told

457 me to do to protect our interests, after Thompson had looked up the points, he advised me what to tell Whittren, and I did so. It was something that the mining laws provided. I have forgotten just what the points were now, but I know he wrote me down a communication telling me what he wanted me to find out and I went and consulted Mr. Thompson, and he looked up the points and then came in and advised me what to advise Whittren to do, and I did so, and also sent him this twenty dollars by Beechwood to make and file amended location notices. There were a good many of those letters, mostly private, that passed that winter. As to the way I paid my share of the assessment work to Mr. Whittren, I have told you before, that we computed it altogether, the provisions I had sent and the twenty dollars in cash, and I don't know whether there was any more or not—I didn't refer to that in that way, what I paid for attorney's fees and advice, so much cash for advice, but when we figured it up, we figured in the whole thing and in consideration, knowing all of these things ourselves, when we

came to make out the bill of sale we took it all into consideration, that I had already paid my hundred dollars, that I had paid more than my share of the hundred dollars on account of the assessment work. I had paid him about a thousand dollars. The deed says a thousand dollars. It amounted to more Mr. Whittren was paid,

458 taking into consideration those provisions and cash and other incidentals and expenditures. As a matter of fact, we estimated at that time that it amounted to more, something like eleven hundred dollars, and shortly after that there was another deposit, and before that when he first went up there. It amounted to a lump sum of a thousand dollars, all told. I don't know if that thousand dollars includes the one hundred dollars; I don't know enough about it to know—in fact, we didn't figure in all those little technical points. I don't think I figured the hundred dollars when he first went up there. We was just supposed to make up a lump sum; we knew it was along there somewheres, and we just lumped it all together and made an estimate of it. That is not all the money I ever sent up to J. Potter Whittren; there were two or three different times. I supposed besides that I sent him up money, that is, I sent him two or three times as much money as was needed when it came to these amended location notices on account of there might be some accident and I wanted him to have enough. I don't know of any one amended location notices. I don't remember whether Julius Thompson gave him the amended location notices to file or not. I don't remember if I sent the money up there and told Potter Whittren to amend the location notices. I remember that I sent him up some money once by Beechwood. Mr. Whittren reported to me that he did the assessment work in 1901 upon this ground in which he and I

459 were interested. I think he preserved the ground. J. Potter Whittren never asked me for a dollar that he didn't get, never a dollar for anything. I don't know how many claims he represented up there in 1901. I don't know now without referring to the list he reported to me—I don't remember how many there was. I don't know anything about those amended location notices, he never turned any of the records over to me. I don't know when it was. I never did know when the amended location notices were filed in the Port Clarence Recording district; I never saw any of the amended location notices. I accepted Mr. Whittren's assessment work in 1901, on these claims and I sent the money too. I sent enough grub and provisions and the like of that, money when he asked for it, to keep him up there; or to help to keep him, anyway. I don't know how many claims there were to be represented—somewheres between ten and fifteen; I don't remember the number exactly. I think it was eleven, maybe twelve, or thirteen or fourteen; I don't remember now the exact number there were of them; somewhere around between ten and fifteen though. Some of this grub I sent him, I bought of Joe Hawkins, down here, Hawkins' place, and some of the other Nome business houses besides Hawkins, and some down here at the river store—I don't know where all I did buy them now. Several places, I suppose, around town. Joe

Hawkins. Joe Hawkins' River store down by Snake River.

460 It was a grocery store. Hawkins' grocery store. He ran a grocery business there. I don't know where he is now; the last I heard of him he was in Valdez. I did not know him in Valdez. I knew him here in Nome, but I heard he had gone to Valdez. I haven't got any of the bills I paid at Hawkins' store for groceries to send to Potter Whittren in Port Clarence; I don't know that I ever got any bills for goods I bought for Port Clarence; I don't remember that I ever did anyway. I did not keep any particular account of the goods I bought and sent to Potter Whittren at Port Clarence; Whit and I were a good deal more like brothers in those days than we were like keeping accounts with each other—we were not looking to rob each other. It was not because we were like brothers that I took such particular pains to preserve this bill of sale several years after I told him it had been destroyed, and all these communications I told you about carrying around in a trunk. Those communications, if I have them at all, are some old letters that were thrown aside in trunk and just happened to come to light when I was clearing up things; to begin with, I don't know as I have any, but if I have, that is how they came to be preserved. It is just a more of a happen-so that they are among the existing things if they are. All the goods and provisions, they were

worth I guess, four or five hundred dollars; I don't know, 461 I never figured it all up for some years, and of course it is gone out of my mind now. I don't now remember any of the goods that were sent; it is so far back now that it has passed out of my recollection; that is about too far back for me to remember. Really, back as far as the Nome fire is about too far back for me to remember. I think possibly if I were to think back sometime, I might recall some things. I think there were some rubber goods, some rubber boots—I know there was a pair or two of rubber boots, some boots I know I got from Hawkins' down here, and of somebody else, a firm or two, but I have forgotten the others' names, and then another was this cash which I sent to Whittren early in 1901, and I think there was a man by the name of Dr. Penn, that he lived in a cabin here with before he went up to Port Clarence, and whenever he needed any money he used to come around and borrow a few dollars, and I also can remember when he left here in 1900, he had to be fixed up to go to the new camp. Potter Whittren did not live in a cabin with me; he lived with Dr. Penn, and when he came down from Port Clarence in 1901 they were living together in a cabin, and they neither one of them had anything to go on. That was the following winter. When Whittren came down late in the fall of 1901; I lived in my office on Steadman Avenue and Whittren lived in a cabin with Dr. Penn; they had their

house together. I did have something to do with them then. 462 I kept Whittren the whole winter here in Nome; he came down from Port Clarence in the fall and he had nothing to do all winter, and I supported him here in Nome that whole winter, or until the spring. I had paid something for my assessment work in the Port Clarence district prior to this time. I kept advancing

Whittren cash, and for the reason that he never had any settlement from the spring before when we were to have had—he never had been down for us to have a settlement and when he came down in the fall he had nothing to settle up with. He never rendered me any statement for the assessment work he had done up there, never has to this day. We never had any settlement in full, it was always put off. Our books of account are these two deeds. The only settlement we ever had was in the spring of 1902, when these two deeds were passed, and that settled up the entire account. There was not much opportunity for it to be settled up between us before that time until in the spring—he stayed all winter, the winter of 1901, in the Port Clarence district—he stayed all that winter in Behring City. He was down in the fall of 1901. He had been settled with and paid everything for the fall, and the settlement couldn't come until spring. I got a deed in April, 1902, the reason I didn't get it in the fall of 1901, after we settled up there was, in the contract

463 with him with reference to the Port Clarence property, the way I was to acquire my interest in this property in the grounds, but he was to hold the title to the ground in his own name, and I regarded it as perfectly safe;

I was to put up enough for him to cover the expenses of locating and filing the locations because those things *things* were things that had to be put up in advance, and I was to cover all of those expenses, which I did, and on consideration for that whenever he had paid for everything he had had; in consideration for that he was to make me a deed for my interest. The reason for that was that he had to pay in advance for everything he had done up there, and he didn't have the money to go ahead with, so I put up the cash in advance, in consideration of which he was to deed me my half of the property any time I asked for it. Of course, from the fact that he had to put on two locations, he was delayed, or I presume he was. I think I can show you letters wherein he says we are to be equally interested in this property. I will furnish you the letters themselves, if you want them. You can have every letter that passed between us that I can find, if I can find them, and I think I can; I think I have some of them around, if not all of them. I have them in my possession I think. They are here in Nome, some of them I think I am not sure; I have told you that over and over again. I will be glad to give them to you, if my counsel agree to it. If you will point out

464 the particular letters you want I will give you them, covering what points or dates. I have got no book account with Mr.

Whittren between the year 1900 and the present time. I never kept any book account. When Mr. Whittren came down in the fall and told me how things were coming and that he was in a big rush to get back to Port Clarence, and he told me that he was running pretty short and asked me if I could let him have a certain amount, that he wanted to buy some instruments; I asked him how much he wanted, but that he was short of funds at the time and I let him have as much as he needed, and at that time I said to him, "Whit, old boy," this is a matter that we can settle up afterwards." I never figured on we would have a lawsuit about it. He and I were

two partners, and for my part, trusted each other—we were not so much like two partners as we were like two brothers, and for that reason no books of account or anything of that kind were kept between us. I never figured on a lawsuit or anything of that kind. We were more like brothers than partners. It is not true that the reason why this deed to the Port Clarence properties was made for an undivided one-quarter interest instead of for an undivided one-half interest was because I did not at that time pay to Mr. Whittren the sum for the assessment work upon these properties for the year 1901; the assessment work was not figured in the assessment work no way—

the real question—no such question in any shape or form at
465 the time of making the deed at all. It is clear in my mind that the money question was not counted in at all between us so far as the assessment work was concerned—it was in fact to me plain that I was to have my interest in this property the same as any other grubstaker. That is not the reason the deed was made for a quarter instead of a half, nor for any other reason, because it was made for three quarters instead of a quarter. I told you it was not the reason because it never was made out that way; no. No, that is not the reason. I left Nome in August or September of 1902, after 1901. I learned that the ground covered by the Bon Voyage claim was open for location sometime about the middle of the summer of 1901. I went with it to Potter Whittren; I liked him; I thought he was a fine fellow. I felt towards Whittren as I felt towards a brother, a brother whom I cared a great deal for. I always liked Whittren. I did not send for Whittren and say, "Potter, old boy, here is a fine piece of ground out here; you go and locate it and I will give you a quarter interest in it." It was not that way at all. He said he would go out and locate it and we could go into it together. I agreed to give him a quarter interest for going out to locate it; he got a quarter interest yes. I said that I would give him a half interest. We were the owners in it together; we were supposed to be owners in it together; we were working along and were supposed to
466 be equally interested; everything that we got he expected one-half of and so did I because we were equally interested, except one-half interest; that was another question—we went out and didn't find any location. I didn't tell Potter Whittren anything about this ground, except that it was open for re-location. I hadn't done anything at all upon the ground myself. Nothing at all. When Mr. Whittren came back from locating I gave him ten dollars and a half to go and record the three claims. Three location notices were to be recorded, the Bon Voyage, Five and a Half on Little and the Rocky Bench; there was not another one there that I was paying for at that time; when he came back from locating these claims. Whittren did not hand to me another location notice on Dexter at the same time. None at all on Dexter to me. He did not tell me about then. I didn't know anything about it then. I went out that same time—I could not go both places; I went along with Julius Thompson and located a hundred and sixty acre tract, three miles below Safety Lagoon. I was up at Port Safety at the time myself. I I couldn't go both places very well at the same time. I

was three miles below Safety Lagoon, and located a hundred and sixty acre tract, beyond Nome River and located a hundred and sixty acre tract. Julius went himself too; we went down in a sled and

located it and Whittren and Dr. Penn went out together
467 the night before; I could not be in both places, I went with

Julius; he came down here and hired a sled, and we went out on the 31st day of December, he went out on the 31st of December so as to be there very early in the morning on January 1st, if I remember correctly—it is a good while ago and Julius Thompson and I went myself, in a sled early on the next morning, and we didn't see Whittren that morning until after he returned. I think I could have gone out and located it myself—I think I might. I have done something else towards the Bon Voyage claim except to pay the two dollars and a half for recording the notice of location. In about 1900, I think here, in the fall, just about as I was going out, when, as I remember now—it is pretty hard to remember all these things exactly, how they happened so long back, but I think it was in the fall, or it may have been early in the spring, or possibly late in the fall of 1901. Towards the location of the Bon Voyage claim, I gave Whittren an equal share in all of my claims up there, if he would turn over to me an equal interest in these claims out here, this fraction between Four and Five Anvil Creek, the Bon Voyage claim, and Number Four the right limit of Dexter Creek. Mr. Whittren, knowing the work was to be done on all these other claims, was to put another interest—or he was to have another interest in these other claims here in place of these other claims that were located then, and I think on January 1st, 1903, and 4—

468 1904, I guess—I don't remember the day, he was to get an interest in these *other* for keeping up these others; he was to take care of the Rocky bench; that was all arranged for in advance, which was never done. I have just told you what I did with reference to the Bon Voyage claim in January, 1902, with reference to its location. That is the way the assessment work was to be executed for these claims. It is practically so that before I sent Potter Whittren out to locate these claims, I told him that if he would go out and locate these claims, if he would do the assessment work on the Bon Voyage, and the rest of this bunch, that I would let him in on the other ground, and probably I might give him an interest in it; he never made any objection to the arrangement. I told him before that if he thought he had a better right to them than I had. I refused four hundred dollars for it, for Five and a Half on Little Creek, I refer to now. I refused four hundred dollars for the fraction between Four and Five. I told him I figured on selling it for a thousand or a few thousands. I don't know if Potter Whittren has got any interest in any fraction on Little; only what John Hill told me that he had a half interest for locating it. I don't know anything about it. I don't know myself if Potter Whittren has got any interest out there. He told me in a letter which was produced here, or which I can produce here, in which letter he made some calculations. If all of those claims turned out right that he thought he had

469 here in 1902 and '3. Some people I was friendly with in Dawson and coming over the trail from Circle City put me

onto these claims. Men I was friendly with. I was under no obligations to him; I didn't want his claims; I wanted a check for the money he owed me; but instead of that, he came and said it was all he had; he didn't say, "Here's a claim for you—you done me a favor in Dawson, and I'll give you this claim." I don't remember what kind of shape it was in, it seems to me it was power of attorney; he offered me his receipts or location notices, or whatever way I wanted the ground. I said I didn't know just what shape it was in; I think that had reference to Five and a Half—that meant the fraction between Four and Five on Anvil Creek; I don't remember just exactly about it, whichever it was, a power of attorney, or whether it was location notices, or just what they were. I don't remember just what they were. I don't remember if he left me his power of attorney, whether it was left that way or not; I don't remember just exactly now; I don't remember how it happened to fall into my hands. I don't know whether I had a power of attorney to this property or not; I don't remember whether there were deeds to it or not. The papers were turned over to Whittren at the time that Whittren was out there and had the assistance of a man by the name of Kelly; he and Whittren had some controversy between them about the fraction. I have turned over papers to him and the power of attorney amongst them, no doubt. I don't say that I had a power of attorney; I say that I possibly might have. I don't remember the transaction with regard to all of these claims, just exactly how—I don't call to mind at the present time. I don't remember now how the transaction came about. My memory is not very distinct, no. Not in a matter of this kind, no. I never put my mind on it, of course, like I would if I thought there was going to be any trouble come up over it. I never gave it any thought particularly, because it was the understanding that I was to have the proceeds of the ground; that is my recollection; I never heard from him since he went back to Chicago, or wherever it was he went back to his home; they were pretty well fixed, as I understood the matter, but I never have heard from them since then. On either May 23d or 24th, 1906, Mr. Whittren was in my office in Seattle; I know it was about there somewheres; I would have to look up the records; I have got the records here. We had some few words there; we talked over business matters. Never a hot word passed between Potter Whittren and myself in the world; in fact, his statement here to that effect is wholly false; we never had an unpleasant word pass between us until we had these words down here at the foot of Steadman Avenue last summer. It is not a fact that when I brought out this bill of sale, which has been introduced in evidence here, marked Plaintiff's Exhibit No. 1, and handed it to Mr. Whittren, that there were some hot words passed between us concerning this bill of sale. As a matter of fact, I don't know that I handed it to him. I had it there that day, and we were talking over the location of the ground, whether or not it lay on the paystreak. I got it out of the vault where I kept my papers, the safety deposit vault. I don't remember just when I got it. I think perhaps it was in a pigeon-hole in my desk there when Whit-

tren came in. I had it in there—I went and got it because I wanted to look up the record, because we thought that the paystreak ran across the claim, and I thought that if that was the case that I had better send it up and have it put on record; I had better hold onto it. Perhaps I did not tell him just then that I was going to send it up and have it put on record, but I went and got the deed to see where the location of the ground was, whether I would know by the description whether this was the paystreak that I had been hearing about all winter where the pig pay ran, this big paystreak by telegraph, because the last dispatches that had been received told of a paystreak going across in that locality, and I thought that I had better investigate the thing; I thought it necessary that I might have to investigate, and that if I did that I might have something or know where it ran, at any rate.. This deed did not tell me where the lines of the pay struck. I was told where the location was; I could tell where it was located by the deed; where the ground was located; that is when I got the deed by reference to my memorandum, I got the exact description of the thing. I had been on the ground before and after it was located. I sent for him for the purpose of seeing if he could throw any light upon the special location so if it was on the paystreak we would know about it. I think I can tell about where the ground is located from this deed. I didn't know the exact location of this ground, though I had been out there twice before this time; all I know was that it was off No. 7, on Newton Creek—I didn't know the exact location or description, only about its locality. I didn't know whether it was just exactly on No. 7 Newton that the paystreak ran; that was the reports that were coming out during the winter, that the paystreak had been found in that locality. I didn't know they had a beach line at that time, that is over on Newton.

Question. Now, you knew, as a matter of common knowledge, that the plain description of Newton Gulch, what locality this ground was situated on on Newton Gulch, and knowing that locality as you did, that you could at least determine where this ground was, did you not?

Answer. Well, I don't know as I did know where it was located at that time.

Q. Having been out on the ground twice before, yet you were not able to tell where the ground lay; is that what you now say?

A. Well, simply being out upon the ground—the line that I was on was two or three hundred feet from Newton—it was so far from Newton itself that there was not much to tell where you was from Newton—it was so far out of the road in this case; in fact, I was only across the upper lines of the Bon Voyage—I went across where the upper line lay, and I never saw any but the upper end stakes; I never even saw any of the lower end stakes—just the upper end stakes; I never was on the lower end of the claim at all. That was in 1901.

The WITNESS (continuing): In 1902, that time that I was out there once, in 1902, I never saw the lower end stakes; I just cut angling across the upper end of the claim. I was not out there when

the snow was on the ground; I came across the upper end of the Bon Voyage, that is, I just took in the upper corner of it, and rounded across and came across and down the right limit of Dexter Creek, across the round of hill, took in the bench on the right limit before you get to the Bon Voyage, and came across the upper end, saw the upper end stakes of the Bon Voyage claim and then over the hill down again, and across down Dry Creek and then came home. I could remember the lay of this ground where I crossed it coming back to town, on the occasion I have just described. I know just how the ground lay at that time. I remember distinctly being upon the Bon Voyage claim and seeing the upper end line stakes. I said the reason I wanted to see this deed was, I wanted to know if I knew the lay of the ground or not, was why I wanted to see the deed and description, because I didn't know whether I did know its location or not, at that time. I knew the lay well enough so that I can tell the route I

took when I was coming across Newton and the upper end of
474 the Bon Voyage, and I think I have explained it sufficiently to you, or as much as I can. If I have not made it satisfactory to you, I can't help it. The deed might show by this description

where the real paystreak ran, and knowing other claims, when I heard of it, where it was located, I knew that it must be bounded by some of them, although I don't say that I knew just exactly, and if it said in the deed at all, I would be able to locate it, or I thought I could anyway. I don't know that Whittren asked me to get the deed to find out where the claim was located. I know that he didn't; I never said that he asked me. I don't know whether I got the deed the morning of the 24th of May; I don't know whether I got it then or a day or two before. I know I had it on the 24th of May; but whether it had been there a little while before; I could not say with regard to that now. I never did learn that the paystreak was running in the vicinity of the Bon Voyage claim; I learned that the indications were that it was liable to run over there, during the winter of 1905, or in the spring of 1906. I did not learn that through a message received through Mr. Rinehart. I wrote a message in 1906, to be forwarded to Mr. Chilberg. That is the message marked Plaintiff's Exhibit No. 13, in this case. That was in response to another message that W. V. Rinehart had received, to look up Potter Whittren for Eugene Chilberg, in reference to this Bon Voyage claim. That was not when I heard for the first time that the Bon Voyage claim

was likely to turn out rich ground; that is not true. Just be-
475 fore this time, I saw a piece in the paper which stated that

this was liable to turn out along the paystreak, through messages that had come out, we heard that they were going to run up along this line from Otter Creek, and cross in there with their drills, and of course I knew from the description that it could not be far from the line of the Bon Voyage, and as it got on towards spring, I learned through messages and letters received in Seattle, in the spring of 1906. The reason I didn't go and get this bill of sale and look it over when I first learned that it was likely to be valuable was because I knew that I could not do anything until the first boats got in and would be going up, in the spring, and I thought the 1st of

June or along there would be time enough. I knew before that in April, that it might be valuable but I also knew that it would be no use to get it out, until closer to the time when the boats were going up in the spring, even if it had any such valuation as the papers were giving this third beach line, so I had no use for the deed until the boats would come in in the spring, anyhow. When I learned that the beach pay was struck on Little Creek, I learned that it was liable to run across this way, in fact, that was the first time I learned that there was another beach line, the beach lines had not been talked about much down in the States before that, but I don't think it was on Little Creek; it runs in my mind that it was some other paystreak or beach line, somewheres along the line of Anvil, I believe, 476 anyway, along the line that paralleled the present beach paystreak, and that the indications were good for that surrounding country over there, but we got messages down below that the Little Creek claims and some others in that vicinity had been struck, and were valuable, for quite a time, but I did not recognize the names of those claims in there, and I didn't pay much attention to the claims, particularly the May and the Bessie, and the line of pay that ran along that way, because I was not acquainted with the ground in that locality to amount to anything; anyway, I didn't know the names of those claims and they didn't interest me so much. I think it is correct that I did not learn that the third beach streak ran east and west until the spring of 1906; it might be I think that that is right, that I did not learn that the third beach line ran east and west along on Otter creek until the spring of 1906; that is, last spring a year ago. I believe that that is right; yes. I kept this deed down in the safety vault because that is where I usually keep those things, as a matter of precaution. The two deeds were always in one envelope and the two might sometime be of some value. I was pretty busy around those few days along the last of May, and I didn't take it back until the next time I was up town by the vault for something. All that I wanted was to look at the description in the deed, but I didn't take the time to go back to the vault with it for a few days around there, because I was very busy and I hadn't taken it around back again; I didn't go up to the safety deposit purposely to 477 carry it back again. I do not know anything about why I did not take it out while I was there at the vault and look at it. I had taken the precaution to protect it theretofore; I had kept it there in the vault with my other papers as a precaution against fire and so on. I don't know of any particular reason why I should take it out of the vault unless I was taking it up to the office to show to Whittren; I don't remember about that now; that may have been the reason, I don't remember. The chemicals that were in my office came into my office by a lawyer friend of mine from Chicago, a man by the name of Frank Kellerman; the tallest man in the country—in Alaska, anyway; every one knows him that knows anyone in the Dawson country; he owned a building in Chicago, or did, the last time I heard from him; was practicing law there. I don't remember just when he came through here; in the summer time; he was making a hurried trip through the country; had been to Dominion

Creek in the Yukon Territory to serve some papers and back again, and he made the last trip in the shortest time that ever had been made from Chicago and back again. He stopped over only a short time in Seattle and came in to see me—we were old friends; went together in 1896, eleven years ago last spring; we went in over the trail together. I don't know whether or not he is the kind of a man who uses ink erasing fluids on his legal papers.

(Bottle handed witness.)

478 Question. Now, I want to know if that is the same kind of chemicals that was in your office, or the same chemicals in preparation or manufacture that was used in changing Plaintiff's Exhibit No. 1, the deed offered in evidence in this case by the plaintiff?

Mr. MURANE: Objected to as wholly immaterial and irrelevant, and not proper cross-examination, and all having been gone over before with this witness by this very counsel when the defendants called him upon the stand themselves; on the further grounds, also, that it is calling for an expert opinion or conclusion by the witness.

The COURT: I think he has fully examined with reference to the nature of the materials in ink erasers; I don't think there is any use in going all over it again; if there is anything omitted, my attention has not been called to it. Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Mr. COCHRAN: We offer to prove by the witness now upon the stand that the chemicals composing Defendants' Exhibit "Q" are the same as the chemicals used in the alteration of the instrument Plaintiff's Exhibit No. 1, upon which plaintiff relies in this case, the Exhibit "Q" for identification, being commonly known as Sanford's Ink Eraser.

Mr. MURANE: Plaintiff objects to the offer as wholly irrelevant and immaterial, and does not prove or disprove any of the issues in this case, and for the further reason that defendants have

479 gone over the whole ground with the witness now upon the stand with reference to the chemicals contained in the eraser used in this case, and that it is not now proper cross-examination.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I had in my office some chemicals—I don't know what it was called. I don't know whether it was Sanford's Ink Eraser or not. I do not remember that I testified on my direct examination that I had Sanford's Ink Eraser in my office; it was one of the leading formulas ink erasers which was put up at Lowman & Hanford's—I don't know but what I went down to Lowman & Hanford's and got it—I think I did; I wouldn't be sure, but I believe I stepped down and got it for my friend; I don't know whether it was Sanford's though—I think I bought it at Lowman & Hanford's, though, myself; I believe I did. I don't remember

that I swore on my direct examination that it was Sanford's Ink Eraser. I believe I bought it at Lowman & Hanford's; I wouldn't be sure, but I believe I did. I don't remember whether I bought it or whether Mr. Kellerman bought it; I don't recall now which it was. I said I may have stepped down and got it for him; I don't say whether I did or not, though. I don't know whether I bought it because I don't remember now; it was not a matter to charge my mind with. The reason I think I went and bought it, 480 was Mr. Kellerman was in a big hurry and was on his way to the boat when he wanted to use this eraser, and I have forgotten whether I stepped down and got it or whether I told him where to go and get it, but it rather seems to me now that I just stepped out and downstairs and got it for him and came back. I know that he was in a great hurry; I don't know whether I did or not, but I believe I did. He was there going up and coming back again, I remember, and I believe I did—I believe I went down and got it myself. I think I testified the other day I got it at Lowman & Hanford's; I know I got it in the leading store and only went to the nearer one, whichever that was, because Mr. Kellerman was in a hurry, but I tell you I don't remember which, whether I went down and got it or whether he went out and came back and left it there. It was my recollection when I testified before that my lawyer friend went out and got it and left it there in my office. I said I was not positive now but I believed I went out and got it. It was supposed to be purchased at Lowman & Hanford's; I don't know which is the closest place to my office, but I think Lowman's is, and that is the reason I say I think I went down to Lowman's, is because it is the closest to my office and I went as quick as I could go down and back because he was in a great hurry.

Question. Now, just tell this jury what kind it was.

Mr. MURANE: That is objected to as wholly irrelevant and immaterial, and all having been gone over before.

481 The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. What did it look like?

Mr. MURANE:: Same objection.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. What was it called?

Mr. MURANE: Same objections.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Mr. FINK: We offer this testimony on behalf of Waskey and

others for the purpose of testing the credibility of the witness and contradicting his previous statements made by him heretofore, and also for the purpose of showing the character of the chemicals used in this case and to introduce Defendants' Exhibit "Q" for the purpose of showing what effect such chemicals will have under given conditions, and to show exactly how and when this change was made according to our theory of the case.

Mr. MURANE: It is objected to on behalf of the plaintiff on the ground that it is wholly immaterial and irrelevant, and that it has all been gone fully into before by the defendants with this same witness when they called him upon the stand in their direct
482 examination, and for the further reason that it is an attempt to contradict the testimony of a witness upon the stand in their own behalf and an attempt to impeach a witness which they called themselves.

Question. What kind of an ink eraser did you call this Lowman's ink eraser?

Mr. MURANE: Objected to for the reasons that it is irrelevant and immaterial, and not proper cross-examination.

The COURT: Objection sustained; he has already stated exactly what he called it, if anything, and there is no use wasting time to go over it again.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. Now, what leads you to believe now that you went and got the ink eraser?

Mr. MURANE: That is objected to as wholly irrelevant and immaterial, and not proper cross-examination, but was something drawn out by the examiner by his own examination.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. What was the ink eraser used for?

Mr. MURANE: Objected to on the grounds that it is wholly irrelevant and immaterial and all gone over before with this same witness, and is not now proper cross-examination.

The COURT: Objection sustained.

483 To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Question. Was there any instrument altered in your office other than the instrument Plaintiff's Exhibit No. 1, between the 21st of April, 1902, and the 24th of May, 1906?

Answer. Yes, there was this instrument that Mr. Kellerman was changing in my office at some time between those dates.

Q. You have examined the chemicals which I handed you marked Defendants' Exhibit "Q" for identification, did you?

A. Yes, sir.

Q. Are those the same character of chemicals which were purchased by you in Lowman & Hanford's, that is, the same character of chemicals in manufacture, as were had in your office and used in the alteration of this Plaintiff's Exhibit No. 1?

Mr. MURANE: We object to the question on the ground that it is wholly irrelevant, incompetent and immaterial, and not proper cross-examination; and also on the further ground that counsel for defendants went into the subject fully with this same witness when he was upon the stand in their own behalf, and that they are now barred from cross-examination.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

484 The WITNESS (continuing): I do not know what instrument it was that was altered in my office by Mr. Frank Kellerman. I did not assist in the alteration of the instrument. I saw the instrument there on my desk; that is about all I know; I didn't pay any attention to it. I suppose, technically speaking, I only saw the chemicals there on my desk, and he told me that he was going to alter an instrument, and I saw it there on my desk. He was there in my office, had the chemicals there, and told me that he was going to alter an instrument.

Question. You took it up to your office, knowing that he intended to reform or alter an instrument, and that is what you purchased these chemicals for, to reform or alter an instrument?

Mr. MURANE: Objected to on the grounds that it is irrelevant, incompetent and immaterial, and has all been gone over several times already with this very witness, and is only consuming the time of the court and jury. Besides it is not proper cross-examination.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them then and there excepted, which exceptions were allowed by the Court.

Question. Is your office used extensively for the purpose of altering instruments?

Answer. My, no; the only time it was ever used was these two times.

Q. How much experience have you had in altering instruments with acids or chemicals?

485 A. Not any.

Mr. MURANE: Objected to as wholly irrelevant and immaterial, and not proper cross-examination.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I was there a part of the time when the instrument, Plaintiff's Exhibit No. 1, was being altered—that is to say, when it was ready, I saw the writing go in. I saw the writing go in. Saw Mr. Whittren doing the writing. I was standing looking over his right shoulder when I saw the writing go in; I came in through the door and looked right over when he wrote. I only knew at the time that he was erasing from the deed what it was in the conveying clause, as I told you before, because he had deeded away more than he owned in the *Bon Voyage*, as appeared by my deed. I testified to that before. I don't know, I presume that I answered the same way when that question was asked me before; that was the fact all right. After the 21st day of April 1902, I don't think the deed was ever talked about—I think it lay there folded together in the same envelope, the two deeds together—I don't know that we ever talked it over anyway; I don't recollect having talked it over now, anyway. I certainly remembered that it was a deed to this ground that I had. I knew I had it all the time, but I don't think that we talked about the deed, although I think we may have talked about the claims and the interest—no, I don't think we ever talked about the deed; I don't think we ever referred to the deed but the one way; that is the only way I ever remember mentioning the deed, was concerning the interests in these claims. I had recorded the contract with Mr. Whittren up in the Port Clarence District. Well, the time when I had that recorded Whittren was a comparative stranger to me; I had seen him up in Dawson, but when he spoke to me in Nome he was a comparative stranger to me, and when he was up there, I decided that it would be just as well to put the deed on record, and I did so, because the property was up there and I was down here, and as I said, Mr. Whittren was a comparative stranger to me then; I didn't know him as I did afterward, and one time when the deputy recorder was down here, I sent it up to put on record. If I ain't mistaken I sent it up to Mrs. Bernardi—her brother was recorder, or deputy or something—her brother, I think it was. I have just told you why I took these precautions, the property was up there and I was down here and I wasn't much acquainted with Mr. Whittren—those were the only reasons for my precautions. Mr. Whittren was not very well acquainted with very many people around town that first year or so. I left here in the summer or fall of 1902. I remained absent until I came up here I think the latter part of September, last year. When I left here in 1902, I went to Ohio by way of California. I did not remain a great while in Ohio; my family were back there. I could not say how long I was back in Ohio—two or three weeks, maybe a month or so; then I came back to Seattle and went to practicing my profession, after a short time in Seattle. I did not go back east for the purpose of floating some oil corporation stocks; that was incidental to my visit home. I did float such a corporation.

Question. You were engaged in engineering the affairs of that corporation for how long?

Mr. MURANE: That is objected to as immaterial and irrelevant, and don't tend to prove or disprove any of the issues in this case, and is not proper cross-examination.

The COURT: Objection sustained; if he wants to go into another business that don't prove abandonment.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I returned to Seattle, I think it was in November, 1902, to the best of my recollection; it may have been October; I don't remember for certain; I was only home to Ohio for a very short time. I have paid from 1902 to the present time one dollar for assessment work on the Bon Voyage claim; indirectly I paid; as I have already told you, I paid it in the way of paying expenses. I paid it to J. Potter Whittren and for him. I have paid indirectly a good deal. Twenty dollars to Beechwood, of Tacoma, Washington, at one time. I never got any checks which I had given to Potter Whittren returned after payment; besides this cash which

I have to Beechwood, I furnished Whittren with groceries
488 and provisions, and afterward, down here at Nome, I furnished him with board and lodging in the winter of 1901, and in the winter of 1903, too, when he was outside there was a party sent me some money, belonging to me by Whittren, which he got, and also provisions furnished Whittren, and when Beechwood left there was money that he owed to me that he turned over to Whittren, cash, was turned over to Whittren, who was working on these claims at that time. It is not a fact that I never paid one cent for that deed directly; I always paid my debts. J. Potter Whittren and I always settled our accounts. Yes, just on the spur of the moment I don't remember any other way than indirectly that we ever settled, but we always settled. I never paid him any other way than indirectly because he never asked me. J. Potter Whittren never asked me for anything he didn't get; he got every dollar he ever asked for.

Question. You never have paid Potter Whittren nor anybody else one dollar directly since 1901 upon the Bon Voyage claim for doing the assessment work upon that claim, directly, have you?

Answer. I have paid expense directly—what do you mean? Q. Answer the question yes or no.

A. As the question is framed there, no, not to the best of my recollection—you say directly? That means, did I personally pay anybody? I don't recollect just now on the spur of the moment—

Q. Don't you know that you have not up to the present time ever paid anybody one dollar directly for performing assessment
489 work on the Bon Voyage claim since 1901.

A. Well, I know that I paid Beechwood some money for Whittren in a settlement of a suit that was pending between the two men, while Whittren was up in the Port Clarence District, whether you would call that directly or not, I don't know, but I paid him the cash money out of my pocket for Potter Whittren—I

have told you three or four times that I had furnished Whittren with provisions and supplies, which were just the same as cash; they cost me cash and he wanted the grub—you can call it what you please—directly or indirectly; it was cash money.

Q. Where was this suit that you paid for Potter Whittren directly, what was there in it?

A. I don't know whether it was in suit yet or not, or whether it was matter that was settled before it went to suit, but I know Beechwood was running around demanding pay from Whittren and Whittren sent me word to settle up with him and get rid of him.

The WITNESS (continuing): I don't know what that suit was for only that Beechwood claimed that Whittren owed him. It is not a fact that this was a question involving provisions and an outfit between Beechwood and Whittren, and that you, upon hearing only one side of the story, turned over some money which you had of Whittren's to Beechwood, and as it turned out Whittren had nothing whatever to do with it. I haven't got any contract for it. There was no contract. Whittren just simply advised me to go ahead and pay

him, he was there and he had no grub, as it happened, and
490 I sent it to him, as I recollect, before he had put his suit on record. That is a part of the way that I recollect now that I paid for my assessment work. I don't know just exactly the date of that transaction, but I can if you will let me think a moment; it was in the spring—in the spring of the year while Mr. Whittren had his office on the third floor of the Lumber Exchange Building. I believe in 1903; it was in the spring of 1901, when Mr. Whittren had his office on the third floor of the Lumber Exchange Building in Seattle, and I had my office on the 4th. Mr. Whittren told me he borrowed two hundred and twenty-five dollars of Beechwood. I didn't tell him anything. He told me that he needed all the money he could get hold of, that he needed to buy some instruments, to go into surveying up here, and that he would need a thousand dollars to pay up all he owed up here, when he came back in the spring. I did not say "Whit, old boy, we will just let that go on the assessment work on the Bon Voyage claim." I did not say anything of the kind. I couldn't say just what was said between us, there was no occasion to say anything like that between us. We understood one another, or I thought we did. He told me he wanted to buy some instruments and was short of money. He practically told me to settle with Beechwood. I settled with him on Mr. Whittren's orders, but I would like to explain how it happened. I stated that there had been no change in Plaintiff's Exhibit No. 1, since May,
1906, the 24th day of May, and that there had been no
491 change in the instrument since the injunction proceedings here last winter. Since that time I have had the instrument showing it to quite a number of individuals, but it has been kept all the time. I didn't have it in my pocket or showing it to somebody for examination; it has been kept in the safety deposit box in the Miners & Merchants Bank.

Question. Now, examine that document and say whether or not that is in the same condition, Plaintiff's Exhibit No. 1 that it has

been since May, 1906, since the month of May, and more especially that portion of it showing erasures. I refer especially to that portion which shows partial erasures, or showing where erasures have been made heretofore.

Answer. I don't see any difference in it, Mr. Cochran.

Q. That is in the same condition as it was when it was exhibited here at the injunction proceedings?

A. I don't see any change in it at all; it may have been soiled from being handled so constantly or by others handling it and looking at it, or as it has been in this case; it may have been soiled.

The WITNESS (continuing): I made an affidavit in this case, at the time of the application for the restraining order. (Paper produced.) Examining the instrument which you hand me, I will state that that is my signature to that instrument. I swore to that before Judge Murane, I believe. At the time of making that affidavit, I had had Plaintiff's Exhibit No. 1 in my hand and examined it. I stated in that affidavit as follows: "An examination of said
492 deed will show that said changed portion is in the handwriting of said Whittren." Yes, that is true; you may have to use the magnifying glass to see that it says that. I think the magnifying glass that I used was down in the Miners & Merchants Bank. I remember it took me a couple of hours to study the proposition through.

Question. Now, is it not a fact that the writing underneath at the time it was exhibited in open court showed plainly enough that some of the letters at least could be deciphered with the naked eye at the time it was exhibited in open court upon the injunction hearing?

Answer. Not by my naked eye; my eyesight is not so good as some others.

Q. And was that not what you meant when you made this affidavit, when you swore that an examination of said instrument will show that the portion which has been partially erased would show that it was in the handwriting of the defendant Whittren? Was that what you meant?

A. I don't know. I don't know what was meant at that time; I guess the affidavit will show for itself if you read it over carefully.

Q. I asked you whether that was what you meant. Answer yes or no.

A. Well, read it over so that I can hear what it says. I can't remember what it does say so long—read it—

493 Mr. COCHRAN (reading): "J. J. Chambers, being first duly sworn, upon his oath deposes and says: I am the plaintiff in the foregoing action; affiant has read the affidavit and answer of J. Potter Whittren, in which defendant Whittren denies affiant's interest in said Bon Voyage claim and refers to a certain paper writing purporting to be a bill of sale from said Whittren to plaintiff of an undivided one-half interest in said claim, and also alleged the said defendant did not execute said bill of sale; affiant alleges that said bill of sale or deed was signed by said

Whittren and acknowledged by him before F. E. Fuller, a Notary Public, and all the writing contained in the body of said deed is in the handwriting of said defendant Whittren, and affiant denies that he ever changed, mutilated or altered said deed in any manner, and alleges that any change made in said deed was made by said defendant Whittren, and affiant denies that he ever changed, mutilated or altered said deed in any manner, and alleges that any change made in said deed was made by said defendant Whittren, and affiant denies that he is guilty of any fraud in connection with said deed, and alleges that said defendant Whittren has at all times since the execution of said deed recognized affiant's interest in said Bon Voyage claim both prior and subsequent to May, 1906, and has frequently since said date acknowledged affiant's interest in said claim as will appear from letters written by said defendant Whittren to affiant, which said letters are in words and figures as follows, to wit:—

A. It says there that the changed portion is in Whittren's handwriting, where it was changed there, the one-half; that the
494 one-half and the writing in the changed portion is all in Whittren's handwriting, and that is what it meant, it meant just what it says—that seems plain enough that the changed portion is in Mr. Whittren's handwriting, which it is.

The WITNESS (continuing): I meant by this affidavit that the one-half appearing in Plaintiff's Exhibit No. 1 is in the handwriting of Mr. Whittren. I know it is in the handwriting of Potter Whittren.

Question. Now, examine this deed (Ex. 1) and tell this jury if an examination of that clause there will show, under a glass, no handwriting, except that of J. Potter Whittren, or if it will show the handwriting of Potter Whittren underneath that portion there, under the words "one-half."

A. I can't see without my glasses, but I will state that I have seen well enough, where it clearly showed where what was supposed to be double "e." Mr. Fink has stated that here several times that he could plainly see writing under there at the time when the injunction was up, he said it showed where some letters were there.

Q. No, I want you to show me where you meant in your affidavit you saw the handwriting of Potter Whittren there?

A. The affidavit will speak for itself.

Mr. COCHRAN: I offer the entire affidavit in evidence.

Mr. GILMORE: We have no objections.

The COURT: Let it be marked.

495 Whereupon, the paper referred to was received in evidence, marked Defendants' Exhibit "R," and read to the jury in full, and is in the words and figures following, to wit:

DEFENDANTS' EXHIBIT "R."

Affidavit of J. J. Chambers.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE et al., Defendants.

UNITED STATES OF AMERICA,
District of Alaska, ss:

J. J. Chambers, being first duly sworn, on his oath deposes and says:

That he has read the affidavit of J. Potter Whittren and denies each and all of the allegations contained on the 4th, 5th and 6th pages of said affidavit; and also denies the statement made in the affidavit of F. E. Fuller, wherein said Fuller says, that in September, 1906, affiant admitted "the said instrument had been changed by him the said Chambers," but on the contrary affiant told said Fuller that said deed originally was made for a three-quarter interest in the Bon Voyage claim and that it was changed by Whittren in affiant's office in Seattle, so as to read a one-half interest, and that
496 said change was made by consent of affiant; that at the time the said change was made, affiant and said Whittren had been talking about the Bon Voyage claim and said Whittren told affiant he had deeded a one-half interest in said claim to Andrew Eadie for having the assessment work done and locating pay upon said claim; and that it would be necessary, in order to make the title complete in Eadie to reduce said deed to affiant from three-quarters to one-half; that affiant consented to said arrangement, and said Whittren, by the use of chemicals, erased the "three-quarters" and wrote in the place thereof "One-half"; and an examination of said deed will show that said changed portion is in the handwriting of said Whittren; that the said Whittren has never presented a statement to affiant for services performed by him in doing assessment work upon claims that affiant has not paid the same when presented.

J. J. CHAMBERS.

Subscribed and sworn to before me this 15th day of October, 1906.

[NOTARIAL SEAL.]

C. D. MURANE,

Notary Public in and for the District of Alaska.

(Endorsed as follows:) "Case No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendant. Affidavit of J. J. Chambers. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second
497 Division, at Nome. Oct. 15, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. C. D. Murane, Attorney for Plaintiff."

The WITNESS (continuing): In this affidavit, I certainly do not say anything whatsoever about the original interest stated in the deed being for a three-quarter interest. It is true that it is nowhere mentioned in the affidavit at all; my attorneys prepared the affidavit of course, and I suppose they thought that was not necessary.

Question. Now, will you swear that an examination of that deed will show the handwriting of J. Potter Whittren?

Answer. No, I don't.

Mr. MURANE: That question is objected for the reason that the affidavit speaks for itself and does not require any explanation.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Q. Now, you tell this jury that the instrument which I hold in my hand (Ex. 1) has some evidences of writing underneath the words "one-half" and is in the same condition as when you exhibited it upon the hearing for injunction last October?

A. There is no difference, only the deed has got soiled, having it handled here by so many persons, it has got dirty having it around here. It must certainly be.

Q. You discussed with your attorneys the fact of the altered instrument and the effect of it, so far as the law was concerned, with
498 reference to the effect of the law upon the altered instrument, did you not?

A. Yes, we discussed the matter of the altered instrument with reference to the whole interest, and the whole case.

Q. You were informed by your attorneys, were you not, that if it appeared upon the face of this instrument in the portion erased that there was some writing underneath, that it would be prima facie evidence of its contents, were you not?

A. I don't remember any such conversation as that ever took place; I took the case to them and let them handle it—placed the case entirely in their hands, just as you would want me to do with a case in your hands, and they have had the handling of it since then.

The WITNESS (continuing): The effect of an altered instrument was discussed with them, but I don't remember what information was given me on the subject of the legal effect I don't recollect it now if they gave me any information on that subject. I was not advised between the time of the injunction hearing in this case and the time of the trial of the case, that if there appeared upon the erased portion evidences of other writing, showing an alteration upon the face of the deed, that it could not be admitted as prima facie evidence until explained; I don't believe that the subject was ever brought up.

Question. The instrument as now appears to the naked eye does not show any writing but the words "one-half," does it?

499 Answer. I know that the double "ee's" just can be located with the named eye, but I could not see them until they were pointed out by Mr. Collier. I sat there with a glass for a couple of hours trying, but could not locate them, but after I had them located for me once, I can locate them again.

The WITNESS (continuing): The first time that I ever learned of any particular value of the Bon Voyage claim was on receipt of information or a message having been received by W. V. Rinehart—that is, as far as our claim was concerned other than I had learned in reference to it that it would probably be in line with the pay—yes, that was the first information directly of it. That was the first information I ever had of the value of the ground itself. I had never had the deed out that I can remember of now until about that time. It was in the office some two or three days before it was changed. The change was made before Rinehart received the message. The change was made two or three days before I had any knowledge of the message. I said that I forced upon Mr. Whittren this memorandum marked Defendants' Exhibit "D"; he didn't want to take it and I urged him to take it. He had been looking after this ground since 1902. I guess it would be right that he had no interest in it since 1904. I explained this afternoon, I thought, very fully about my paying him anything for looking after this claim all these years. I explained fully, that I had paid him. Yes, I paid him, not in cash—I explained that except what I had paid to Beechwood, you understand that and I don't claim that I paid it in cash direct to

500 him; that has already been explained. I mean that I had been paying him indirectly, and as far as that is concerned I never knew that he had no interest in the ground, that he had deeded away all and more than he had in the claim.—I never knew that he had deeded away his interest—I always supposed he had an interest until 1906, when in the spring of 1906, that he had deeded away to Mr. Eadie; I never was aware of the deed to Mr. Eadie until the spring of 1906; Mr. Whittren never told me he had made this deed to Mr. Eadie until this time when we were discussing this claim up here. I never knew Mr. Eadie had a deed until 1906. I say that I didn't know of any agreement that was made with Mr. Eadie with reference to the assessment work prior to the 24th of May, or somewhere along there. I think it was when Mr. Whittren came into Seattle. That was the first intimation that I had had that there was an agreement with Mr. Eadie whereby he was to get a deed to a half interest for performing the assessment work on the Bon Voyage. I supposed that J. Potter Whittren was looking after the assessment work on the ground and was seeing that it was done; it was settled for, anyhow, and he ought to have been if he didn't. We could not do anything else but look after the claims until there squared things up with Beechwood, it was understood that Mr. was something done to develop them only just to wait and see if they ever turned out any good, and when we settled up after I had

501 Whittren was to look after them, and see that the representation was attended to. All the money that I paid for looking after them was what I paid indirectly by way of this lawsuit. I had some goods shipped up to the Port Clarence District on the steamship "Oregon." I don't remember whether J. Potter Whittren sent the money down to pay for these goods when he ordered them or not.

Question. Don't you know that J. Potter Whittren sent down here an order on Hawkins for a hundred and fifty dollars' worth of

goods and that he sent the money down by the captain of the "Oregon" at the time to pay for them, when he sent down the list?

Answer. I remember about a list being sent down.

Q. Don't you know that C. P. Dam, who was operating the steamship "Oregon," brought down the list of goods from Mr. Whittren and that he did not pay you enough for the goods that were contained in the list that Mr. Whittren sent down to be filled?

A. I believe you are right about that.

Q. You believe that I am right and that he sent down the money with the list when he sent down for the groceries and provisions?

A. Since you have put the question in this form, I believe that you are right, but I don't believe that I ever got the letter with the money in it until afterwards, but I believe I got and sent him more goods than his money called for. I remember of sending him up by freight a lot more goods than his order called for, some fresh goods,

I remember. I don't think I paid the cash for those goods to
502 Hawkins; I know I sent three or four more crates of goods than his list called for. I am inclined to think that I was mistaken in my testimony this morning about paying for the goods that I got from Hawkins. I didn't get any goods from Hawkins to send up there until I got his order for them. I am inclined to think that Hawkins was doing business during the winter time of 1900, down here in the River store. I believe he was running the River store. I don't remember of the River store being washed out in the big floods of 1900. I know there was a severe storm in the fall of 1900. I know that I had business down there on River street that I did for J. Potter Whittren, and that I bought a bill of goods there, purchased some goods for him during the early winter time of 1900, at the River store, and later on Hawkins came around with the bill for the goods purchased at his place down on River street here, over and above what Whittren had sent money for. I think I bought these goods of Hawkins' grocery-house, called the River store. I do not remember that on account of the storm which Nome had here in September, 1900, that the River store was entirely washed out, entirely abandoned in fact, and that after the storm had subsided that the River store never did resume business and never was reconstructed again after having been washed away by the storm. I never heard of any such proposition as that the Federal authorities

interfered with them re-building any business houses along
503 there on River street, after the severe storm of 1900, on account of the danger to life and property. I never heard of the Federal authorities interfering with the reconstruction of business houses on River street. I know there was a severe storm that fall. I don't know that no business has ever been conducted on River street since that time. My recollection is that the goods that I sent up over the winter trail in 1901, I got from Hawkins; that is my recollection about it. My recollection is that I did pay for provisions sent up to J. Potter Whittren in the Port Clarence District. I do not know how much I sent up to him. I do not remember. I think I sent one package up there, it seems to me, by a man by the name of Murray, the mail-carrier from Nome to Behring

City. I am not sure about it but it seems to me that he was the man that I sent them up by. I believe if my memory serves me right, that Mr. Whittren wrote down by this young man who carried the mail and I sent him back some goods. I think his name was Murray, I ain't sure, and if I remember right one time Jim Rudd was here and was going up to Behring City, and I also sent some up by him. My best recollection is that I sent some up by J. P. Rudd and by the mail-carrier; it is a good while ago and I don't recollect all of those little details like I would if I had ever known that it was going to be questioned like it is now—I don't recall the whole transaction by any means, but it is my recollection that Whittren

504 sent down word that grub was getting short up there in the spring, and I know that I could not ship it up without a good deal of expense. I do not know who was carrying the mail to Port Clarence that winter. I may have known at the time—probably did, but it has passed out of my mind now; I can't recall all those little details now at this late day. I know that there was a mail route to Behring City that winter. I couldn't swear that there was now no, I don't know now. Whatever I sent up I sent up by the Murray boy that carried freight that year; I sent up by him and Jim Rudd—just some potatoes and something of that sort, something that didn't weigh too heavy—it is my recollection that his name was Murray—that is my recollection—if I didn't send him anything else, but I think I sent up a few provisions, is my recollection during the winter up there. Of course, I am positive of that. I never thought of charging my mind with those things, when we came to settle up our business with the few things I sent him up there, but I know I sent him some potatoes and a lot of other things. I didn't think of making any note of those things at the time; I thought we understood one another, and I never dreamed that we would be having a law-suit about our affairs together, in the way this has turned out. I didn't get into any lawsuit with this man down in Seattle. My recollection is that I paid Whittren two hundred and twenty-five dollars down in Seattle through a lawsuit with

505 Beechwood. My recollection of it is that as a matter of fact this bill which I paid to Beechwood in the spring of 1903 was for groceries and provisions which Potter Whittren had got from Beechwood and didn't repay; I believe it was for groceries and provisions. It is my recollection of it that it was for groceries and provisions which Beechwood had furnished to Mr. Whittren in the Port Clarence District and had not repaid. My recollection is that it was in the winter time and there was expenses for groceries and provisions that Potter Whittren didn't repay to Beechwood, and some moneys and some provisions and when he came down and told me the circumstances, as I understood there was some money coming to Whittren, and I paid it for him, and there was also some money for attorney's fees with reference to his property up there, which I paid, and together with this advice and legal fees at different times coming to Thompson his attorney, and there was also a certain amount of provisions, I don't know how much, and then there was another lot in which Beechwood was interested, as well as

some claims that Beechwood was interested in, Nos. 13 and 14 above Hayden's Discovery on Gold Run—that is my recollection that there was some attorney's fees with reference to that ground too, that I had advanced for Mr. Whittren, and I know also that I let him have money in that way for attorney's fees and for some grub, and then in this Beechwood matter which came up there was some attorney's fees subsequently, amounting in all to two hundred and twenty-five dollars, all of which were taken into account in my settlement with Mr. Whittren. I do not know that any attorney's fees that there were coming in this Beechwood matter, was for groceries and provisions which Whittren had got from him, which I was to, but failed to send him I do not know anything of that kind. I paid Julius Thompson in the matter of this advice which I sent to Potter Whittren, I don't know whether you would call that contracting or not; I paid him for legal services in Whittren's behalf. I have got receipts from Julius Thompson for money paid to him for services furnished Mr. Whittren through me. I have not got them here, I have got them at home, but I never thought of such a proposition coming up—I am not sure but what that receipt which was kept in the safety box might show it; I don't know whether it would or not, I believe it would. I am not certain that I have it, I have not seen that receipt for some years, but I know I have a big batch of papers here and it might be that it is amongst them; I don't think I have seen it since I left here, but there is a big bunch of papers out here on the claim too; that I brought up here with me, that are out here in the cabin on the claim, and it might even be amongst them. If my attorney says for me to, and I can find it, I will produce it certainly. I did not pay Judge Thompson eight hundred and eighty dollars. I told you before that I paid him some five or six hundred dollars.

507 Question. Well, then you are about three or four hundred dollars short—where did you pay the rest?

Mr. MURANE: This is all objected to because it is wholly immaterial and irrelevant and because it has all been gone over time and again.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): It is a hard question to answer to tell what services were performed by Julius Thompson for the defendant J. Potter Whittren for which I paid. He rendered legal advice for a year or two from time to time repeatedly, about the claims in which J. P. Whittren and I were interested in the Port Clarence District, in which Beechwood and his associates up there were mixed up. I don't know the dates of my asking him about those claims; if I can find the letters they will show the dates. I told you I didn't know if I have the letters which will show when and what I asked Julius Thompson with reference to those claims in the Bluestone for which I paid him some five or six hundred dollars; that I might have. Mr. Whittren wrote down and asked me to ask Julius—I turned the

letters over to Julius, I believe, though, and then he read them and then he gave me the detailed advice, and some he wrote up and answered himself. He wrote to J. Potter Whittren, in response to some questions which Mr. Whittren had asked me to get some attorney's advice on here in Nome. He did not have to start any lawsuits. You give other services than to go into court, do you not? There were no services in court. He wrote a letter on one occasion when he wrote down and told me about a jumper on his claims, and if I had not employed him and got his advice, there might have been some services in court; I have one letter here in which there is reference made to this matter of attorney's advice, if you want it. I have a letter here which he wrote himself; you don't want it, do you? It depends upon my attorneys whether I read the letter to the jury or not; if they want it in they can read it. All that is said in this letter which refers to a lawyer is "I have written you just to let you know that we have a jumper and when the time comes, you will have to see your attorney and find out the best way to get rid of him." That is just one letter; that is all that is said in this letter about this one subject. That is all there is in this letter about getting the advice of my attorney. I went and got the advice of Julius Thompson as to what was the best way to get rid of a jumper. I don't remember now what he told me. I don't think he charged me five or six hundred dollars for that piece of advice. I do not remember how much he charged me for telling me the best way to get rid of a jumper.

Mr. FINK: We will offer this letter in evidence.

The COURT: Let it be marked and admitted.

Whereupon the paper referred to was received in evidence, marked Defendants' Exhibit "S," and read to the jury, and was in
509 the words and figures following, to wit:

DEFENDANTS' EXHIBIT "S."

Letter, May 27, 1901, Whittren to Chambers.

Ron. Crawford.

J. Potter Whittren.

Ans. June 27, 1901.

Crawford & Whittren, Mining Brokers and Real Estate.

Offices:

Seattle, Wash.

Dawson, Y. T.

Nome, Alaska.

NOME, ALASKA, 19.

SULLIVAN CITY, ALASKA, May 27th, 1901.

Dr. J. J. Chambers, Nome.

MY DEAR DOCTOR: I have been expecting a letter from you for the last month, for that reason have not written you, and as I have a chance to send a letter down this evening, will send you a few lines as to how things are up here on the creeks.

There has been quite a little prospecting done on the different creeks during the past month, and some pay located, but the majority of miners are so afraid of lawsuits that one can't find out anything as to what has been found, they keep quiet as to the prospects for if they tell, they have an idea it means a lawsuit; for that reason I don't expect one will hear much about gold being found in large quantities, until they start to shovel in.

510 We have a jumper on our No. 8 Skookum claim by the name of W. R. McKay, who staked it on the 30th day of August, 1900, and recorded it on the 21st day of September, 1900. I staked the claim on the 6th day of August and recorded it on the 21st day of August, 1900, and filed my amended location of the 25th day of April, 1901. The jumper says there was no stakes on the claim at the time he staked, and has twenty witnesses to prove that there was no stakes on the claim at the time he staked; but as luck is on my side for once, I have two fellows that were with me at the time I staked, and they staked the two claims below me and I wrote out their location notices, put in part of their cornerstakes, and they now own the said claims. In fact, we cut the stakes down in the Gold Run Valley, peeled them and fixed them up in "A No. one fashion," and I think of all the claims I staked this last summer, this one was the best marked as to monuments.

This McKay is a Teller man and is doing good work prospecting, for that reason I'm not going to bother him just at present, he is afraid he will lose the claim, and I told him he had nothing to lose, as he never owned it. I am told that he gave Judge DuBose of Nome an undivided one-third ($\frac{1}{3}$) interest for a grub stake to prospect the claim and at the time he did not know I was the owner, in fact he told me he never looked in the Bluestone records to see if it was recorded or not.

511 I have written to you just to let you — that we have a jumper, and when the time comes you will have to see your Att'y and find out the best way to go ahead and get him off.

The Port Clarence Mining Co., has let a lay to a man by the name of Kelly on No. 8, Lucky Strike, and we own an undivided one-third ($\frac{1}{3}$) interest in this claim. The claim is recorded in my name on the 27th day of August, 1900, and on the 24th day of Sept., 1900, a man by the name of Geo. Brock recorded it after having the same surveyed, claiming to have filed the same for record on the 14th day of June, 1900, but Mr. Harris, the recorder, at that time lost the recording papers and did not get the claim of record. I asked Mr. Harris about it and he told me no recording papers was lost from his office and Brock must have forgotten to file them with him. If he can hold that claim after waiting 110 days before recording, I am ready to quit the mining business and go to farming for a home stake up here in Alaska.

The Mr. Kelly that has the lay came to me about it and asked me to let him keep on prospecting, but if there was a chance of his being put off by me, he was going to quit the lay. I told him to keep right on with his work, and as the claim was mine, I would give him a good lay if he discovered pay.

I understand that many men with capital are coming in
 512 this spring and I am in hopes we can sell out some of our
 property to them, keep your eyes open and see what you can
 do in the selling line. Everything that we have is for sale, that is
 if we can get our price.

Enclosed you will find a copy of W. R. McKay's location notice,
 and I don't think it is a very strong one, I'm glad I put on an
 amended location notice, for that ties up the claim in good shape.

I have also enclosed you a list of the claim and the interest you
 own in the Bluestone Mining District, and I own an equal interest
 in the same claims; as our interests, we own a few whole claims and in
 some of the other cases Beechwood owns the other interest, and in
 that way we can sell the whole of the majority of the claims on the
 list.

Let me hear from you soon and anything you may do with the
 claims will be "O. K.," as far as I'm concerned.

Respectfully,

J. POTTER WHITTREN.

(Paper produced.)

Mr. COCHRAN: We will offer in evidence this letter, and ask that
 it be marked Defendants' Exhibit "T."

Whereupon the paper referred to was received in evidence, marked
 Defendants' Exhibit "T," and read in evidence to the jury, and was
 in the words and figures following, to wit:

513

DEFENDANTS' EXHIBIT "T."

Letter, April 26, 1901, Whittren to Chambers.

Ron Crawford.

J. Potter Whittren.

Crawford & Whittren,
 Mining Brokers and Real Estate.

Offices:

Seattle, Wash.,
 Dawson, Y. T.,
 Nome, Alaska.

NOME, ALASKA, April 26th, 1901.

MY DEAR DOCTOR: Mr. Beechwood arrived a few days ago with
 the outlook for No. 13 & 14 above Swansen's Discovery on Gold
 Run, which, to say the least is not very bright. I also received from
 him \$20.00 that you had advanced to have amended location certifi-
 cates recorded. I have amended some of the original location no-
 tices, in fact all, that I think need amending, and have filed them for
 record on the 24th inst. I believe that we will win the two Gold
 Run claims; but not while the present court is in power.

I like to give the lawyers their due, still at the same time I think
 they are away off if they advise against the local customs, rules and
 regulations of the Mining Districts, established by the miners as to
 the time in which to record. It will take more than their word to
 convince me that the 90 days can be extended by the court
 514 to cover Mining Districts where the miners have organized
 and adopted laws for their respective district, and in their

by-laws have a narticle which says, "A locator shall have thirty days in which to record."

From the new code of Alaska, I am led to believe that all the court can do is to provide Recording Districts and not Mining Districts. You will notice that they all go under the name of recording districts, and I think Congress had in view a place where the records or several mining districts, adjoining one another, could be kept, for the benefit of the public, said records being public, and better looked after, if under the direct care of an officer or clerk paid by the Government.

You can ask Judge Thompson if I am not right, and think if he has gone over the code many times, it will stand out as containing much truth.

I am going to call a meeting of the Bluestone Mining District and try to introduce a resolution into the by-laws for the representation of claims in the district, thus keeping the fact before the public of the existence of the by-laws, and not let them become void by disuse.

You can see that if such is the case, the parties claiming to have staked in July, should have recorded in August in order to comply with the local laws, and if they did not, the claim, at the time I filed it for record, was open.

I understand, from Mr. Beechwood, that some of your property in the Koogrock is looking up very well, and I hope it will turn out to be better than you expected. I am getting ready to go out on the creeks, and will be in and out all summer.

515 Let me hear from you when you return from the Koogrock for I would like to hear from that section of the country, as it is spoken of so much, as the coming Klondike of Alaska.

Respectfully,

J. POTTER WHITTREN.

The WITNESS (continuing): I don't know whether Judge Murane was a partner of Julius Thompson at that time or not, or whether it was after that time. I don't know whether they were all in partnership at that time or not, I can't recollect all those little bits of things at this late date; I don't know really whether they were in partnership at that time or not; it is my recollection that they had their offices over — saloon. I have not the receipt from Judge Thompson for attorney's fees paid to him; I told you I hadn't it here, but it seems to me that I have a receipt out in the cabin on the claim. I have not the time to go out to the claim tonight, I don't think tonight, but if I do go out and have the time to look for it—I don't know as I will have time to go over there tonight. I think I saw in looking over some papers here not long ago some of those old receipts in an old trunk that I brought with me up to Nome, and I remember in turning over an old trunk at home I saw a bunch of these old papers, and that possibly might be amongst them, but I don't know that it is; it is so long since I left Seattle, that I don't know. I don't think I paid Julius Thompson to exceed six hundred dollars. I had a lawsuit with Judge Hannum over the possession of this lot here on Steadman Avenue. None of these fees were for that. I paid him in addition to this five or six

516

hundred dollars. I think that came up two or three years afterward, if I remember right, that case. The time that I had the suit with Judge Hannum, Judge Murane lived up here where they had their offices afterwards. I first claimed that I had a half interest in the Bon Voyage claim, after it was located first. I did not claim a three-quarters, I never said so. I claimed a one-half interest. On April 21st, 1902, in the settlement made, three-quarters was deeded to me, when we had our settlement Mr. Whittren deeded to me three-quarters in exchange for properties which he exchanged a quarter interest in for these. My interest was three-quarters as a matter of fact at the time the Rinehart message was received. I never claimed a half interest; I never have claimed a half interest; never expected to receive a half interest in the profits or receipts from the Bon Voyage claim, of course, if I had thought about it I might have remembered it, that it was a three-quarter interest, but I had not thought about the deed for so long. It dawned upon me that I had a three-quarter interest in the Bon Voyage claim when I saw the deed. Whit had told me that he had deeded Mr. Eadie a half interest in the claim for locating the paystreak and doing the assessment work for that winter, and when I got the deed and looked it over, I saw that he had deeded away more than he owned in the

517 claim; that was about two days before this, before the difference was made. I told him when he came in that he had made a deed for more than he owned in the claim. The facts about giving the memorandum to Potter Whittren are these: The claim was valuable or was thought to be a valuable one, and I wanted him to see that Eadie performed the work that was agreed upon; that he had agreed upon when the contract was made and locate the pay, and when he performed that, if there was anything in the claim that we would be equally interested in it, Whittren and I, and if there was anything in the claim at all it would be a good start for the two of us. I claim a half interest in it now; I didn't claim but a quarter interest in it after I gave Whit this memorandum, although I suppose, by rights, what is mentioned in the deed is what I really claim, what it is supposed to give to me, but my object principally was that he should see that Mr. Eadie performed the work and located the pay as he said he would do. Eadie promised to locate the pay according to Mr. Whittren. When he gave him a half interest in the ground, it was with the promise that he was to go ahead and locate the pay; he was to locate the pay for his part of the title; in giving him this contract for a deed, he told me he had done that with the understanding that Mr. Eadie was to locate the pay; and in the spring when he was in Seattle Mr. Whittren told me that he was taking in a boiler and some machinery for the purpose of sinking some holes on the Bon Voyage claim and locating the pay streak, which was supposed to go across the claim; that Mr. Eadie
518 went ahead and located the pay, Mr. Whittren promised me he would see to —, and I told him if he would do that to go ahead and do that and we would be equally interested in the proposition together. He did not tell me that the deed he had given to Mr. Eadie was for him taking care of doing the assessment work on the claim; he said it was to locate the pay on the ground. He did not tell me

he had deeded away half interest in the ground for assessment work; he did not tell me that when he came out to Seattle that fall; he said he had contracted to give Mr. Eadie a deed to a half interest for locating the pay. It is not a fact that the reason the interest was reduced was because Mr. Whittren had deeded away a half interest in the claim for performing the assessment work. I think I might have said that that was the reason the deed was reduced; that was partially the reason because Whittren had got himself into a mess deeding away more than he owned of the ground. Whittren simply told me that for doing the assessment work on the claim and the location of the pay he had agreed to give Mr. Eadie a half interest in the claim, for the assessment work and the locating the pay; I may have said for the location of the pay alone without mentioning the assessment work, but the two were together, to locate the pay and to take care of and protect the claim. Whittren was as much surprised as anyone too when Mr. Eadie showed up in Seattle in the spring; he supposed he was in Nome here and that he would prospect the claim that winter. He told me that he had agreed to deed Mr. Eadie a half interest in the claim for the reason and for the price that Eadie was to locate the pay.

519 Question. Why, didn't you just tell us that he told you that he had deeded him a half interest for doing the assessment work.

Mr. MURANE: We object to this line of examination. There is nothing gained by it; it is simply bickering with the witness.

The COURT: Objection sustained. I do not see the good of it myself.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions — allowed by the Court.

The WITNESS (continuing): It was for the assessment work and for the location of the pay as well; it was for both; the half interest was for both purposes. He did tell me that he had deeded away a half interest. That was the reason why my deed was reduced from three quarters to a half, he had got himself into a jack-pot, and to get him out of the jack pot the deed was reduced. In substance I said, "We will be equally interested in this; take this quarter interest in the proceeds," in substance that was it. We had been good friends in Nome; we had been good friends for a long time. I don't say that I used those words; I don't think I did, but that was the effect; we had been together up there a long time and if the ground was good at all, it would be a start for the two of us, I thought, and I thought, inasmuch as Whittren had got himself into a mess, that I'd help him out as much as I could. I didn't want to take all the claim; I wanted to help him out too. We had stuck it out up
520 there all this long time, and I thought enough of Whittren to see him get some of the benefits of it as well as myself. No one knew the value of this ground then; we supposed it was in the line of the pay. I didn't know it was valuable. Nothing was said at that time about who should take care of the ground after that; the only thing to do was to go on and see if the pay was there, and that was already contracted for, according to Whittren; if he had Eadie

do as he had agreed for his half interest, that was all there was to it. There was nothing said about who should look after it after that. I was not very anxious to *have* Mr. Whittren come back here again and take care of it. He told me he had a good partner a young fellow by the name of Andrew Eadie, who was a good miner and a good, honest, hard-working fellow, and that he was going to look after it and locate the pay; that he had got me a good partner, and that he would take care of and watch the claim; that he was a good worker and a good miner, and the agreement was that he was to go on and locate the pay, so that was all arranged for without more ado. The letters will show for themselves what I wrote to him after he got to Nome. I don't remember if I wrote him a letter saying that he had better stay here and look after the claim himself. I would not say that I did not, because if you have got the letter there it will show for itself whether I did or not. I did write to J. Potter Whittren about his taking care of the claim in a way.

Question. Now, did you write to J. Potter Whittren with reference to his taking care of the claim?

521 Answer. Yes, I did in a way.

Q. Just wait until I finish my question. You did write to him——

Mr. GILMORE: We object to all this line of testimony as being wholly immaterial and irrelevant and incompetent, for the reason that the defendants have never claimed and never relied upon this memorandum of agreement (Ex. "D"), and this whole line of testimony is immaterial for any purpose.

The COURT: After May 24th, 1906, I think this would be incompetent for any purpose. Objection sustained. I suppose you are asking this in support of your theory that the original interest of this witness was one quarter instead of three-quarters, and Potter Whittren's interest was three quarters. Even if that were proven, because of the pleadings this court could only find that this plaintiff owns a half interest or nothing at all, under these pleadings, they must either find he owns a half interest or nothing.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Whereupon a paper was produced and exhibited to the witness.

The WITNESS (continuing): That is the way I wrote this message. With the exception that the name Whittren was written in there by me. Also the last word "Lease one year satisfactory to Whittren; Eadie

consult partner, Nome," that is the way it read originally.

522 I wrote that out myself. I explained this morning why, if J.

Potter Whittren had no interest in this lease, I wrote the message, "Lease one year satisfactory Whittren." Gene Chilberg sent a telegram down to his associate and agent, W. V. Rinehart, Jr., and I showed W. V. Rinehart my deed to this property in the presence of J. Potter Whittren, that I had my deed to a one half-interest in the ground—in the Bon Voyage claim, but Gene Chilberg, nor his associates knew anything about my having any interest in

the claim, and to avoid sending a long explanatory telegram explaining that I owned the ground and not Whittren, in all its details, it would require a long telegram, so we simply wrote out this one curtailing the message, cutting it short in this way, because it would be the point, and so far as we knew then that was all that would be required, and I just wrote out this telegram in this form; that the lease for one year would be satisfactory to Whittren. What I have just stated here now and is all the excuse I can think of now for having written the message that the lease was satisfactory to Whittren. The telegram under the circumstances might convey the idea to Mr. Chilberg that Potter Whittren owned an interest in the claim, but that don't make any difference. It is not a fact that at the time I wrote this telegram I thought that Whittren owned an interest in that claim; not at that time; not in the claim. I wanted him to carry out his agreement or contract after he got back here to Nome, and I expected that he would. That is what he agreed when he left Seattle that he would carry out his contract. Eadie was 523 to find pay on the Bon Voyage claim for the deed; that was the agreement. I told you that the agreement was that Potter Whittren was to have Andrew Eadie find the pay on the Bon Voyage claim. He was to do so; he was to have Eadie locate the pay according to contract. I would be pleased to tell the jury how Eadie was to locate the pay, if I was going to give a lease for one year to Gene Chilberg. Well, this telegram to Chilberg, you must remember, was also sent with the understanding that Mr. Eadie was in Nome. I had no idea Mr. Eadie was outside, nor had Mr. Whittren, and we wired in to Chilberg that Mr. Eadie was a partner in the claim and for him to consult him, and it was with that in view that Mr. Eadie was to have a second lay on the claim because he knew where to locate the pay—he knew where to find the pay, or believed he knew where the pay was, and my idea in giving Chilberg the lease was because as I understood, he had had some arrangement with some of the other people who claimed to own the ground and had already spent a good deal in locating the pay and getting ready to work, and the way I was informed he knew right where to sink to find the pay, and I thought that it was no more than a matter of equity and justice that if anyone had a lease on the ground that Chilberg was the man who should have it, and that was the idea in giving him the law. Mr. Whittren knew that; he knew 524 that I had promised Mr. Chilberg a lease, and the trouble first arose over Whittren giving these other defendants the lease, and not Chilberg, and the men who had located the pay. I thought he should have the benefit of the money he had spent, and it was with that understanding that Whittren left Seattle; that Chilberg and the men who had spent their money on the claim should have the lease and get the benefit out of it; as a matter of justice and equity he was the one who should have had the lease; he had spent his money and had stood without title, but the first thing I knew Whittren had let a lease to some other people, and thrown Mr. Chilberg and his associates down, and as I had already given up a quarter interest in the ground to him, and a half interest

to Andrew Eadie, and he hadn't gone on yet and carried out his terms of the agreement; then in addition to that, to let him have thf first lease right in the face of these other fellows, that I had promised a lease to, I didn't consider that it was honest; that is it exactly. I didn't expect that J. Potter Whittren would go on and complete his contract with Eadie when I sent the message, unless it was agreed on afterwards that he should follow the pay. I contracted with Chilberg afterwards, after he had given Eadie the deed, or contracted for the deed. It is correct, I believe, that I was going to give Whittren a quarter interest in the Bon Voyage, if he would come on to Nome and have Eadie locate the pay.

Question. Then two days afterwards, upon receipt of this message, you wrote out a message and sent it in to Nome, wherein you threw
 525 down Potter Whittren in his attempt to have Eadie complete his contract by leasing the ground for one year to some one else, didn't you, and that is equity, is it?

Mr. MURANE: We object to the question on the ground that it is irrelevant and immaterial and argumentative.

The COURT. Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): Gene Chilberg was to gave the lease; he was the only man I was willing to have on the ground, because we talked the matter of leasing to Chilberg all over, and when Whittren left Seattle for Nome, it was thoroughly understood that Chilberg was to have the lease; he understood that when he left for Nome, and then as soon as he reached here he wouldn't sign the lease himself; and, as I understand, began making all kinds of trouble. When he got this memorandum two or three days after the telegram was sent—he agreed all right, as you can easily see by the message itself, because he has signed this blank here, this message here; that is signed in his handwriting, and so far as I knew that was thoroughly agreed when he left Seattle that he was to have the lease—Chilberg was to have the lease. Then, as soon as he got up here, he wouldn't sign the lease. J. Potter Whittren would not sign the lease. He consented on the 24th of May all right, and then
 526 this came later on; that was the understanding; and then that was followed up by this memorandum; two or three days later on. On May 24th, when this memorandum was made out, we were not intending to let a lease on the Bon Voyage, not at first, this telegram didn't come until later on, as I remember right—the way my recollection of that whole matter is like this: that Mr. Whittren at first intended to have Mr. Eadie go on and locate the pay for his interest in the claim; then this telegram came down to Mr. Rinehart, a day or two afterwards, and we discussed the matter of the lease to Chilberg; for the reason that the telegram told us they had spent a lot of money locating the pay, and I thought that they were entitled to the first show at a lease. Looking at this letter No. 13, I recollect that statement being made in there, that he was en-

titled to the first chance. I don't know when Mr. Rinehart received this telegram. I think I learned of it about two or three days after the 24th of May. I didn't *sign* the date on the reply; the date is not in my writing, anyway; that portion of it is not in my writing. J. Potter Whittren told me about the telegram to Rinehart. I did not show him the deed then. The deed had been changed two or three days before. When I wrote the Chilberg telegram was some two or three days after the 24th; I presume the 26th is right; I don't remember exactly, I didn't write the date, that "May 26th" is not in my handwriting; it was o- the 25th or 26th; I don't know just exactly which now. I think I wrote that three days afterwards, if

527 I recollect, after the deed was changed on the 24th; that is my recollection; the change was made in the deed on the 24th, and then this telegram was written on the 26th, in the morning of the 26th, I think it was. Rinehart brought the telegram in, and this was written the same day. Rinehart had the telegram up in his office, and he brought it down to my office on the 26th—that was the same day. I think that Mr. Rinehart brought the telegram down to my office on the 26th. I don't know positively whether Rinehart brought the telegram in or whether Mr. Whittren; anyhow, we got the telegram. I don't remember positively with reference to the telegram; I can't recall those little details; anyhow, we got the telegram; we had it all three of us there together in my office in the Alaska building, and, after we had finished writing it, I think Mr. Rinehart went over to the telegraph office and translated it from code into ordinary message. I don't know as I could exactly figure out when the exact time was when I changed my mind about giving Whittren a quarter interest in the Bon Voyage claim. I concluded on the 24th to give him a quarter interest with the understanding that when he got to Nome and the claim got to producing, if it ever did, that he would share equally with me in the benefits. I think I have explained pretty fully what he was to have this quarter interest for. The reason I didn't give him a deed to this quarter interest was that I could not very well give anybody a deed who would not take it. I don't remember anything of the kind that I never intended to claim a half interest under this deed until I took the deed down and showed it to my lawyers.

528

Redirect examination.

(Questions by Mr. GILMORE:)

The WITNESS (continuing): I knew nothing about whether Mr. Whittren knew of the existence of the Rinehart telegram at the time he made this change in the deed (Plaintiff's Exhibit No. 1) on the 24th of May, 1906. Two or three days after that date I heard of the telegram from Chilberg. (Paper produced.) That is J. Potter Whittren's signature. That letter was received by me from him. That is the letter in which he refers to the Anvil fraction. I have looked up the letters that were called for by Mr. Cochran while I was on the stand. This is the letter.

Mr. MURANE: We offer this letter in evidence.

Whereupon, the letter referred to was received in evidence, without objection, marked Plaintiff's Exhibit No. 16, read to the jury, and was in the words and figures following, to wit:

PLAINTIFF'S EXHIBIT No. 16.

Letter, January 2, 1904, Whittren to Chambers.

Arctic Brotherhood. Camp Nome No. 9.

NOME, ALASKA, Jan. 2nd, 1904.

To Dr. J. J. Chambers and Family, "A Happy New Year."

529 MY DEAR DOCTOR; I wish you would send me a plat or sketch of the fraction between 4 & 5 Anvil Creek. You sent a letter late in the fall telling about a fraction on Anvil, also a bench on Dexter Creek, which would be opened on Jan. 1st for relocation. I had the same relocated, but cannot tell where the fraction is, that is as to how it lays. Have been through the records, but they contain no information, other than the fact that a fraction exists between No. 4 & 5 on Anvil.

I got a good hard-working Dutchman to relocate the claims, and I put up the recording fees; he gets a half interest and I the other half, so you are in on my interest in the claims. The dutchman is very anxious to get to work on the fraction and wishes to know just how it lays. He says that the creek proper has been worked from No. 4 to the middle of No. 5, and he wants to know whether this was done last summer or this year. The pay in the creek has been taken out. I believe the whole creek will be worked next summer by the Miocene Ditch Co., and we want to know where we are at.

Please send by return mail all information you may have relative to the fraction and oblige.

I had the Bluestone property represented, also the bench off of Newton and paid good cold cash for the same, and know the work was done, so we are good for another year.

I wish that we could do something with this property, and believe if the ditch is put in next summer on the Bluestone we can sluff off the claims up there.

530 I expect to come out next fall and get married, that is, if I have the price; so you can look for me about the 1st of Nov.

Everything is quiet in Nome now, and surveying is out of the question, but expect a busy summer, as many have spoken to me for having their claims surveyed.

Remember me kindly to all, and write at once.

Respectfully,

J. POTTER WHITTREN.

Whereupon Mr. P. J. SMITH, a witness produced on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

(Questions by Mr. MURANE:)

The WITNESS: My name is P. J. Smith. I reside in Nome. I am acquainted with Dr. Chambers. I was acquainted with Dr. Chambers in 1900, 1901, and 1902. In 1902 I had some business dealings with Dr. Chambers. At that time I saw a deed from J. Potter Whittren to Dr. Chambers. I have examined Plaintiff's Exhibit No. 1, which you now hand me, and I will state that I have seen that deed before. I first saw it in the fall of 1902. In the fall of 1902, when I came back from the Kougarok, the latter part of August or September. The interest conveyed by that deed at the time I saw it was a three-quarters interest. Three claims were there described in that deed. I saw the deed which you have shown to me (Ex. 1), in Nome last fall. I just looked it over at that
531 time. At that time in the place of the three-quarters, it was changed to just a half. There is no change in it now from the time I seen it last fall.

Cross-examination.

(Questions by Mr. COCHRAN:)

The WITNESS: It is not changed any that I can see since I saw it last fall. None whatever. I have seen it once last fall. I should say it was sometime this winter—I could not say exactly—I don't remember exactly the date now. I looked at it about ten minutes then. I don't know what I was looking at it for then; it was down at the Miners and Merchants Bank at the time. Dr. Chambers showed it to me. He just told me to come in there with him; that he wanted me to look over the paper carefully. It was not the idea that he wanted me to see if it had been changed since I saw it last fall. That is not what he told me. I did not go in there out of mere curiosity and look it over again. I think it was in the latter part of August or early in September, 1902, that I saw this paper before. Dr. Chambers showed me this deed. He didn't exactly tell me to read it over; he showed it to me for me to look it over if I wished. He showed it to me in his office here in Nome. He handed it to me and told me to look at it, and I looked at it. I looked at it several times during the time it was laying there on the table. He was paying me some money at the time, or he had given me some money—he had gone up to the bank and drawn
532 some money, and it lay there on the table while he was gone, so I couldn't help seeing it there in front of me. It belonged to Dr. Chambers. Was there laying on his desk. He had left it there for me to look at while he had gone to the bank; just where I could look at it.

Redirect examination.

(Questions by Mr. MURANE:)

I was making a business settlement there with Dr. Chambers at the time he showed me this deed. The doctor had grubstaked me to the Kougarok; he was living in Nome at the time, and he had

given me the money for some assessment work in the Kougarok. My attention was called to this particular deed at that time. The doctor told me when he showed me the deed; he said that if those claims ever turned out anything, he told me that might be my chance for a lay on them some day or another. He referred to them three claims: The Bon Voyage, Five and a Half on Little and the Rocky Bench claims.

Recross-examination:

The doctor told me that if they turned out any good we might have a chance with a lay on some money I picked up some papers on his desk and looked them over. I was handling these papers and instruments. That was in September or August of 1902; it was either the latter part of August or the first of September. The next time I saw this instrument was in the summer of 1906; no, I seen that instrument one time in Seattle, early in the summer of 1904, I think it was. I don't know that it was shown to me
533 for any purpose at all. It was when I was going south last season. I saw it in Dr. Chambers' office in Seattle. I saw it in his office in the second story—I don't know the names of the buildings in Seattle. It was on a kind of a desk up against the wall, laying there amongst some other papers, on a kind of a desk that he had there in his office. I do not know that Dr. Chambers kept that interest in the Safety Deposit Bank under lock and key.

MR. GILMORE: We now offer to read in evidence the deposition of W. V. Rinehart, taken upon notice and interrogatories. (Reading of notice and order duly waived.) We will offer also the cross-examination as a part of our case in chief.

MR. COCHRAN: We make the objection to the cross-examination that it is irrelevant, incompetent and immaterial, for any purpose whatsoever.

The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

And thereupon was read to the jury the deposition of W. V. RINEHART, who testified as follows:

My name is W. V. Rinehart, Jr.; my residence is Seattle, Washington; my profession, an attorney at law; at present secretary and manager of the Chilberg Steamship Agency. I am acquainted with J. Potter Whittren, one of the defendants. I had a conversation with said Whittren in Seattle the latter part of May
534 or the first part of June, 1906, with reference to the placer mining claim known as the Bon Voyage in the Cape Nome Recording District, of Alaska. I had several conversations with reference to the Bon Voyage claim. In the first one I told him I had received a telegram from Eugene Chilberg of Nome requesting me to secure, if possible, a lease on the Bon Voyage claim. I showed Mr. Whittren the telegram, which explained that Chilberg and others were then working a piece of ground under a lay from Otto

Halla, and that the melting snow had disclosed other stakes bearing the name of Whittren and that Chilberg desired to get a lease from Whittren on the twenty-five per cent basis saying he would protect Whittren if pay was found. Mr. Whittren informed me that he would have to consult with Dr. J. J. Chambers before he could give me an answer, and I think he promised to arrange a meeting with Dr. Chambers as soon as convenient. And in a day or so after this conversation, I met Whittren at Dr. Chambers' office in the Alaska building, and we had a further conversation relative to the same matter. There was at this conversation, some talk about the different interests that Whittren and Chambers had in the Bon Voyage Claim, and they exhibited to me a deed or bill of sale, signed by Whittren purporting to convey an interest in the claim to Chambers. Upon examination of the deed I noticed that the words describing the interest conveyed had apparently been changed by

535 the use of acid or some chemical, and I mentioned this to the gentlemen and they said that the change had been made by their mutual consent, and as it then read it conveyed the interest they had agreed upon, and my best recollection of that interest is that it was an undivided one-half; we discussed the matter somewhat and they told me they would let me know in a short time whether they would consent to the lease. Within a very short time thereafter, on the same day, Mr. Whittren brought to my office with the Chilberg Agency a telegram written on one of Dr. Chambers' prescription blanks. It read in substance to this effect: "Whittren agreeable to lease. Consult Eadic, Nome." After reading this telegram, I suggested to Mr. Whittren that we change the wording of it so as to make it a message from him to Chilberg, which we did, and Mr. Whittren signed it, and I dispatched it through the United States cable office to Mr. Eugene Chilberg, at Nome. I am acquainted with Dr. J. J. Chambers. Upon the invitation of Mr. Whittren I accompanied him to Dr. Chambers' office for the purpose of talking over matters with reference to the Bon Voyage claim, in the Alaska Building, Seattle, Washington, and the conversation I have heretofore related, as far as it relates to Dr. Chambers, took place at that time. During a conversation between myself, Chambers and Whittren, which took place at Seattle, Washington, in May or June, 1906, there was something said about a

536 deed, which purported to convey an interest in the Bon Voyage claim. As I have heretofore answered, when the deed was presented to me, I remarked that it appeared to have been changed with acid, or some other chemical, and these two gentlemen explained to me that it had been changed, but that it was mutually agreed to, and that the deed as it then read was the interest that they had agreed upon, and that the deed had been changed because of some readjustments of interests which they had held jointly, and that by mutual agreement they had divided up their interests between them and the interest in this claim was fixed at the amount then written in the deed. The defendant Whittren at Seattle, in the month of May or June, 1906, stated to me in the presence of J. J. Chambers, in his hearing that a change had

been made in the deed from him to Chambers for an interest in the Bon Voyage claim, pursuant to an agreement between them to change the interest conveyed thereby. The defendant stated to me that the reason the change was made was as I have stated heretofore. I had a conversation with said Whittren with reference to sending a telegram to parties in Nome concerning the Bon Voyage claim. Mr. Whittren came to my office with the Chilberg Agency, and informed me that he and Dr. Chambers had concluded to give Mr. Chilberg the lease he desired, but it would be necessary to get the consent of one Andrew Eadie, who was supposed to be at Nome or York, and as I have said before, he gave me a draft of

537 the telegram which he suggested I might send to Chilberg.

I suggested that the telegram might be changed so that he might sign it and make it a direct telegram to Chilberg from him, and accordingly I changed it with pencil and dated it and Mr. Whittren signed it and said I might send it to Chilberg. I first learned that J. J. Chambers had an interest in the Bon Voyage claim from J. Potter Whittren. I got that knowledge during the latter part of the month of May, 1906. He stated that Dr. Chambers was interested with him in this claim and it would be necessary for him to consult with Chambers before he could give me any answer as to the leasing of the claim to Chilberg. I had a conversation with J. Potter Whittren in Seattle, Washington, during the month of November, 1906, relative to the Bon Voyage claim, and the interest of Chambers therein. I met Mr. Whittren on Second Avenue in Seattle towards the close of navigation in 1906; I don't remember whether it was during the month of November or October, and he asked me if I had made an affidavit for Dr. Chambers with reference to the controversy between them. I told him I had and we began talking generally about this matter and I said to him, "I didn't know that you made any objection to the deed or its changed condition when I was talking to you in Dr. Chambers' office." He answered that he did not make any objection at that time and didn't deny that there had been a change made, but he

538 said the change was made pursuant to an agreement between him and Dr. Chambers that Dr. Chambers was to do something subsequent thereto, I don't just remember what it was

he was to do, but my recollection is that he claimed that Dr. Chambers had agreed to go on to Nome that spring, and to contribute money towards working the claim, or defending the title, or something to that effect, and that Chambers had failed to perform his agreement and that he, Whittren, had consulted attorneys at Nome and they had informed him that such a change made in a deed, subsequent to its formal execution before a notary public, rendered it voidable and that he, Whittren, had elected to refuse to recognize any interest in Dr. Chambers. In the month of November, 1906, the said Whittren acknowledged to me that the change in the deed from him to said Chambers had been made by agreement between said Chambers and said Whittren.

Cross-examination:

I had a conversation with the defendant in the spring of 1906, in regard to sending a telegram concerning the Bon Voyage claim, and such telegram was sent. I have no copy of that telegram present, but I gave up the original signed by J. Potter Whittren to Mr. Kirkpatrick, an attorney, in the New York block or building, a short time ago, for the purpose of having it attached to a deposition

I gave before him in this same cause, and the substance of
539 the telegram, as near as I can remember it, was as follows:

"MAY 26, 1906.

Agreeable to lease, consult Andrew Eadie, York, Nome.

J. POTTER WHITTREN."

The telegram which was sent to Mr. Chilberg was an exact copy of the one left with me by Mr. Whittren, except that it was written on one of the cable office blanks. Personally, I do not know whether Dr. Chambers knew I was sending the telegram; he did not request me to send it, but Mr. Whittren informed me when he brought the telegram to me that he and the doctor were agreed to sending the telegram, and I didn't deem it necessary to mention Chambers in this telegram, because Chilberg had asked me to secure a lease from Whittren. I have never received any communication of any kind from J. J. Chambers or his attorneys, nor, so far as I know from any of his agents. I think, however, I received word from his wife, asking me to call her up on the phone. I have no letters, telegrams, or communications of any kind. The word from Mrs. Chambers, as I remember it, was a pencil memorandum left asking me to call her up, but that memorandum has been lost. My communication to her over the phone was simply a brief talk in which I told her I was willing to give a deposition or affidavit to the facts as I remember
540 them. I had a conversation with W. J. Rogers concerning the Bon Voyage claim. As I now recall it, there had been several memoranda left on my desk to call up Mrs. Chambers on the phone, but I failed to get into communication with her, and Mr. Rogers called on me and asked me to make an effort to reach Mrs. Chambers by phone, as she was anxious to talk with me. He then asked me what I knew of the transaction, and, as far as I can remember, I told him of these different conversations with Whittren and Chambers as heretofore set forth.

And thereupon the defendants offered the following testimony in sur-rebuttal:

Whereupon Mr. J. S. WHEELER, recalled as a witness by the defendants testified as follows:

The WITNESS: I have been in the ink manufacturing business. I have been making inks for about thirty years. I am familiar with the ingredients of those inks that I make. Mineral iron is not used in all commercial inks; they don't use iron in all inks; in most inks they generally use tannic acid in ordinary marking inks, as well

as other ingredients. Logwood is the principal thing used now for coloring inks. For the last twenty years there has not been a gallon of tannic acid inks on the market.

Cross-examination.

(Questions by Mr. GILMORE:)

The WITNESS (Continuing): I never made ink out of rusty nails. When I was a boy I never made ink out of old nails and old iron, black ink. I never heard of that.

541 Whereupon J. POTTER WHITTREN was recalled as a witness for the defendants, in sur-rebuttal, and testified as follows:

(Questions by Mr. COCHRAN:)

The WITNESS: I have examined the instrument which you hand me and I know when that instrument, all except the words "one-half" and the figures " $\frac{1}{2}$ " in the brackets, was written. It was written in the fall of 1901.

Mr. COCHRAN: We will ask you to have this paper marked for identification Defendants' Exhibit "W."

(Paper referred to marked for purposes of identification only, Defendants' Exhibit "W.")

Cross-examination.

(Questions by Mr. GILMORE:)

The WITNESS (Continuing): The reason we didn't have it dated when it was written was, I was in Port Clarence when this was gotten up, and it wasn't acknowledged at that time by Mr. Beechwood. No date was put upon the instrument in 1901, because the sureties were not acknowledged. We could have executed it just as well when it was acknowledged, only it was getting the witnesses and having it know, because it was not acknowledged at the same time, and there was no need to do it twice; that is all the reason I know. Then we were going to fill the date in when it was acknowledged. I did not

542 put the date in because I was going to have it acknowledged before a notary public, and I didn't care about going twice before a notary. I did not even put the month in or any other time.

Redirect examination.

(Questions by Mr. COCHRAN:)

The witness continuing: Mr. Beechwood has been out of the country since the fall of 1901; in December, I believe, it was; yes, since December, 1901.

Whereupon Mr. O. D. COCHRAN was recalled as a witness for the defendants in sur-rebuttal, and testified as follows:

(Questions by Mr. FINK:)

(Paper handed witness.)

The WITNESS: I have seen the paper marked Defendants' Exhibit "W," which you now hand me. I think the handwriting on the face of that paper is mine. I wrote it either yesterday or during the course of this trial. There were marks upon this paper where it looks so badly discolored.

Question. State whether or not since this trial has been in progress there has been anything written in ink which had not been on there before other than there appears where the writing is now discolored, or whether or not prior to that time there has been partial markings which have been removed with chemicals.

Mr. MURANE: Objected to as wholly immaterial, and merely an attempt to impeach and contradict witnesses upon an immaterial matter.

543 The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Mr. ORTON: In order to make the record complete, we offer to show that at the time this document, Exhibit "N" for identification, was exhibited to Mr. Grimm, a witness on behalf of the plaintiff, there had been erased from it ink marks or writings of the same character with which it is now written of which more than half—three-quarters is now completely removed, and that it was removed in the court-room during the time of the progress of this trial and before the jury or in the presence of all.

Mr. GILMORE: Which is objected to as being wholly immaterial and irrelevant, and an attempt to impeach a witness upon an immaterial matter.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

(Paper handed witness.)

The WITNESS (Continuing): I have examined Defendants' Exhibit "O," which you now hand me. I have seen that paper before and it is in my handwriting. I was in the courtroom when this paper was shown to Professor Grimm, and he testified concerning it. I could not tell you who it was written by; it was given me by Otto

544 Zoekler in the clerk's office, turned over to the clerk's office just before court commenced. I don't know who wrote it, I am sure. I erased some writing from this paper with chemicals, the words between the parenthesis, here in the courtroom, while Professor Grimm was testifying.

Question. Was it entirely erased, or was there any traces of the former writing, afterwards discerned?

Mr. MURANE: We object to all of this line of testimony upon the grounds that it neither proves nor disapproves any of the issues in this case.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Mr. ORTON: We offer this in evidence, if your Honor please, for the purpose of showing that ink writing can be entirely obliterated by the use of chemicals, for the purpose of contradicting Professor Grimm upon that point without leaving any traces whatsoever. This is for the purpose of showing and contradicting Professor Grimm, and to show, also, that the "one-quarter" has been entirely erased and obliterated and the words "three-quarters," then written in again and partially obliterated, and to contradict the statement that there has only been one erasure, and that it would have been impossible to have told it.

Mr. MURANE: We object to the offer on the grounds that it is immaterial and incompetent, and does not tend to prove or dis-
545 prove any issues in this case, nor is it shown what chemicals were used, or that they were the same chemicals used in the application to the instrument in dispute in this case, or that there were the same numbers of applications, or that the circumstances were the same or similar in any regard.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I have looked at paper marked Defendants' Exhibit "" for Identification. I have seen that document before. Looking at the words "one-half" and the figures " $\frac{1}{2}$ ", in writing and figures, the portion in parenthesis, this being the document identified by Mr. Whittren as being written in the fall of 1901. Mr. Whittren gave that paper to me. I did not know Mr. Beechwood, that I recall.

Question: Now, Mr. Cochran, just state what was originally written where there appears to be an erasure where the words "one-half" and the figures " $\frac{1}{2}$ " appear there now?

Mr. MURANE: Objected to as wholly immaterial, what was originally written there, and because it is an attempt to impeach a witness upon a wholly immaterial matter, before the jury.

The COURT: Objection sustained.

To which ruling of the Court, the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

546 Mr. ORTON: We offer to show by the witness now upon the stand that upon the paper the words originally written there were "one-half"; that he removed the words "one-half" with chemicals and thereafter wrote the words "three-quarters" in the same place, and thereafter partially obliterated the words "three-

quarters" again and wrote in the words "one-half" in ink. We offer to show that the original words "one-half" were entirely obliterated, no traces whatever appearing there, and the words "three-quarters" appear there in the same fashion now that they do in Plaintiff's Exhibit No. 1, in this case. This is for the purpose of contradicting Mr. Grimm, that there was only one erasure on the paper introduced in evidence by the plaintiff, and also to show that other erasures possibly may have been made upon said instrument as we claim that there have been.

Mr. GILMORE: To which same offer the plaintiff objects as wholly immaterial, incompetent and irrelevant.

The COURT: There is no testimony as to how the application was made in the two cases, whether the same materials were used or applied, whether the same instrument which was being testified to by Mr. Whittren, or not, in the same method, and whether the same acids were used, all those things which are left to conjecture, hence we think this is improper. Objection sustained. It might not be the same kind of ink or the same kind of acids either.

547 To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Whereupon J. POTTER WHITTREN was recalled as a witness on behalf of the defendants in sur-rebuttal, and testified as follows, to wit:

(Questions by Mr. COCHRAN:)

The WITNESS: The instrument marked Defendants' Exhibit "U" for Identification was written with the same character of ink as Plaintiff's Exhibit No. 1.

Cross-examination.

(Questions by Mr. MURANE:)

The WITNESS (continuing): I say this was written with the same character of writing fluid. I used Carter's Writing Fluid. I got it in Behring City. I made out these deeds to Dr. Chambers in Nome, Alaska. I packed the same bottle of ink down here with me. That was in the fall of 1901. I came down to Nome in the fall of 1901, and the following spring, the spring of 1902, this deed was made out. I still had the same ink bottle that I had got the summer before in July.

Mr. ORTON: We now renew our offers, and make the same offers to prove with reference to this Exhibit "U."

Mr. GILMORE: And we make the same objections to the offer to prove.

The COURT: We will sustain the objections.

548 To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Whereupon J. POTTER WHITTREN was again recalled as a witness in behalf of the defendants, in sur-rebuttal, and testified as follows:

The WITNESS: I heard the testimony of Dr. Chambers on the stand to the effect that he sent provisions and groceries to me while I was at Port Clarence. He never sent me a pound of provisions to Port Clarence. I heard his testimony with reference to groceries and provisions sent up to me on the "Oregon." I paid for them myself. I sent an order down. These groceries were partly lost and never was delivered to me at Port Clarence. I was repaid back by the steamship company, by C. P. Dam, acting as their agent. Dr. Chambers sent me twenty dollars by F. W. Beechwood to amend some location notices for some claims in the Bluestone that we were both interested in. I heard him testify that he had sent me up some provisions by some mail-carrier and also through J. P. Rudd, and his party. That is untrue. I heard Dr. Chambers' testimony that he had taken care of me here from time to time. He did not ever take care of me here from time to time. I heard his testimony with reference to his being up to my cabin with Dr. Penn in the winter of 1901. The facts with regard to that are, I made a proposition to Dr. Penn to furnish him with coal and two hundred

549 dollars' worth of grub in lieu of rent, and we were to share and share alike in the expenses of the winter. Dr. Chambers did not contribute one cent and he did not have any claim on it at all. I heard Dr. Chambers' testimony about paying two hundred and twenty-five dollars indirectly with reference to the Bon Voyage claim by reason of a lawsuit that I had against Beechwood. The facts with reference to that are: I brought an action against F. W. Beechwood in the spring of 1903, at Seattle, Washington, to recover seventy-five dollars loaned and borrowed from January 1st, 1901. I had a grubstake contract with him which expired December 31st, 1901, and my lawyer, with whom I brought suit, told me I would have to transfer to Tacoma, that Beechwood lived there, and that I had no record of the grubstake contract and on account of having no account of the grub which I had got. I had got grub during the winter and he thought that he would be entitled to prove the grubstake, and that I could recover the seventy-five dollars which was loaned and which Beechwood admitted. Beechwood agreed to pay fifty dollars and I accepted it, "Beech" agreeing to pay the costs. I think I got about twenty or twenty-five dollars out of the transaction. That is the whole transaction. That was for a grubstake I had furnished him up in the Port Clarence District, and for money advanced. For money loaned. Dr. Chambers did not furnish an ounce of that or pay a cent or buy an ounce of provisions which

550 Mr. Beechwood took from me. Dr. Chambers never gave me one cent which I loaned to Mr. Beechwood. He had nothing whatever to do with the result of that lawsuit. He had nothing to do with it whatever. I do not know whether or not he paid Julius Thompson five or six hundred dollars for legal services down here on my behalf; that is all nonsense—it is all news to me; that is the first time I ever heard of it. The only legal services that I had performed down here by Julius Thompson for Dr. Chambers in my

behalf in 1900 is what I said in one of these letters which you have here. What I said in a letter to him down here, that we had a jumper; the only jumper that I ever had was on No. 8—he had staked subsequent to me but I had made no discovery of gold, and after inquiry into the matter, we settled it up between us and I gave it to him. Julius Thompson never performed any legal services for me of any sort. He did not for Dr. Chambers on my behalf or for me. He never drew any papers for me. I do not know of anything that he could have done for me through Dr. Chambers, with reference to anything in which Dr. Chambers was interested, that would have been worth five or six hundred dollars, that could have been paid for attorney's fees for. I heard the testimony of W. V. Rinehart in his disposition. I can state fully the conversation that I had with W. V. Rinehart, Jr. I am able to consult it very fully by consulting my memorandum. I made a memorandum of it at the time. The last memorandum which was the conversation which I had on

the succeeding day, I made in my room in the hotel in Seattle, in the spring of 1906. I have read over these notes of my conversation with Mr. Rinehart. Mr. Rogers and Mr.

Rinehart were present at the second conversation, as I remember now. The first conversation was in 1903—I will get the dates fixed first—we arrived from San Francisco in the evening of the 22d of May, which was Sunday; in the forenoon of the 23d I met Mrs. W. V. Rinehart on the street in the afternoon about four o'clock, and she told me her husband had a telegram which he had got from Gene Chilberg at Nome, Alaska, pertaining to some property I owned near Nome, which he wished to lease; she gave me the best directions; his office directions or address, in the First National Bank. I think it was—I don't remember the name of the building—some kind of a banking building, and I went up to this building but Mr. Rinehart, they told me had gone home. The next morning, that was the 23d, and the next morning would be the 24th. I called Mr. Rinehart up on the phone from Dr. Chambers' office and asked him to come down. I asked him to come down on the 24th of May, 1906, and bring the telegram with him which I referred to from Chilberg. He said he would and he came down to Dr. Chambers' office—

Mr. MURANE: I wish to enter an objection to this because this same witness has already related fully his versions on the conversations in Dr. Chambers' office which he is starting in to relate again.

The COURT: Thus far he is only repeating what he has gone over before; if there is anything further, better have him get to it without going over this again. Objection sustained thus far.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): The first conversation on May 24th, 1906, in Dr. Chambers' office; that was the first time I had met Mr. Rinehart since two years ago at least. He told us all there, the three

of us being present, Dr. Chambers and myself and Mr. Rinehart, and Mr. Rinehart told us that he had a telegram from Mr. Chilberg; that Mr. Chilberg had sent a telegram asking to get a lease on the Bon Voyage; he said he wanted to know if he could do so. I asked him if he had the telegram; he said that he had it up in his office down in the First National Bank, and that if I would go with him he would give it to me. I got the telegram, right then. We went out of Dr. Chambers' office, and in about five minutes. During that time Dr. Chambers had gone and got this bill of sale, and exhibited it, and handing it to Mr. Rinehart, says: "You see I am interested in that claim, too."

Mr. MURANE: We move to strike out the latter portion of this answer as not being responsive to the question, it not being a conversation between Mr. Rinehart and this witness which has been asked for, and which Mr. Rinehart has testified about. This is testimony for the purpose of contradicting Mr. W. V. Rinehart in his deposition, and with which Dr. Chambers has nothing to do.

553 Mr. COCHRAN: By giving the conversation in full, he is able to make it intelligible.

The COURT: No, I don't think there is any excuse for encumbering the record this way, with these repetitions. Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): Mr. Rinehart looked at the bill of sale and he said: "There appears to be a radical change in the bill of sale." I says: "That is all right, we understand that—we have fixed about that," or something to that effect; referring to the agreement which I had had with Dr. Chambers that we would not publish it on him. We left Dr. Chambers right there, Mr. Rinehart and I, we left the Alaska Building and left Dr. Chamber: in his office. He had the bill of sale in his hands or in front of him there on the desk when we left the office together, right after Mr. Rinehart looked over the bill of sale, and I made the remark which I have testified to. And that is as far as I could say occurred there. Nothing more was said that I recall with reference to the bill of sale; we went down to Mr. Rinehart's office and he gave me the telegram to Gene Chilberg, and he said he would go with me and get the Western Union Code, which he did, and translated the message. I told him I would see him in a day or two about a one year lease of the premises, the Bon Voyage claim. I took this conversation down in substance; I

554 have it here. (Paper produced.) I took it down in substance at the time. That is all the conversation in substance that occurred there at that time. I had the next conversation with Mr. Rinehart, to which he has referred, when I delivered the telegram. That was in this building in the First National Bank, but I also called to get some information with reference to this Gene Chilberg telegram, and then I delivered it to Mr. Rinehart in the First National Bank building afterwards. Mr. Rinehart and myself were present when I delivered the telegram. I told Mr. Rinehart that I had agreed to

this telegram, if he would put it into code reading, "One year lease satisfactory to Whittren, consult Eadie, partner at Nome," and then we modified it somewhat by my signing it, and then we added the word- "York" and "Andrew," and scratched out the word "Whittren," which, by me signing the telegram was not necessary, and then Mr. Rinehart put the telegram into code—he wanted to know who Eadie was. I told him who he was, that he was a young fellow by the name of Andrew Eadie; told him that he was a partner in the Bon Voyage claim, and that he would be the one to consult up here. I did not know at that time he was outside, you know. So then, after he had written in these additional words, he put it into code. He says: "I will scratch out the word 'Whittren'; there is no need of that, and you can sign it." "All right," I said, and I signed it, so we scratched out the word "Whittren" and put in the word-

555 "Andrew Eadie" "York," and that is the manner in which this message was gotten up, and I signed it and he sent it to

Chilberg. Dr. Chambers did not see this telegram after it was written out. I had the first conversation with Rinehart, in Seattle, in the Scandinavian Bank, in the Alaska Building, in Seattle, Washington, on the corner of Second Street, in the afternoon of November 2d or 3d. Mr. J. S. Wheeler was present during that conversation. Mr. Wheeler and I were there when Mr. Rinehart came along. We were waiting for the third party. We were there standing in front of the Scandinavian Bank, Mr. Wheeler and I, standing right there, and Mr. Rinehart came along; I shook hands with him and I said—I introduced him to Mr. Wheeler; he said he remembered his face, but didn't know his name; he said he had met a man's wife just now, that he didn't know before that the man was married; that he had a wife. I asked him who it was. He said, "I just met a Mrs. J. J. Chambers, I never knew that he had a wife before." I have the memorandum prepared at the time there. This was written right at the time. I cannot relate the conversation without referring to the writing; it is quite lengthy; the conversation was between us there in the bank, and I went right up stairs in the Alaska Club in the top floor. I went right up to the top floor and I wrote this right off on the typewriter there in the Alaska Club room. This was written off right away there so-ne after it occurred on account of certain very important statements coming from him, which he had furnished Chambers in regard to this lawsuit, so I understood.

556 Mr. GILMORE: Move to strike out that as not responsive to the question.

The COURT: We strike out the latter part with reference to what he understood.

To which ruling of the Court, the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I remember the conversation. I remember it but I have not read it for several days; in general, I remember it. I can read it over again. If I can refer to it, then I can give the whole thing—well, I will give it without reading it,

what I can remember. The substance of the conversation was about this: Mr. Rinehart told me that Mrs. Chambers had called up last evening and wanted him to make an affidavit in this case for Chambers. An affidavit with reference to this suit. Said, I understood, she wanted him to make an affidavit in an action which Chambers had brought against me. I said that I was going to get his deposition; that I wanted to get his deposition in the case for me; that Mr. Fuller was going to get it, and had agreed to look after it, and he agreed to it, but afterwards he could not agree to his deposition on account of information I had told him, I was assaulted in Chambers' presence, or I had assaulted him in Rinehart's presence. I told him that I had stated the circumstances to Mr. Fuller of his Rinehart's coming into Chambers' office at the time we were having the altercation in regard to changing the bill of sale,

at the time that Rinehart was after the lease. He told me
557 that Mrs. Chambers wished him to make an affidavit on behalf of Chambers, but that he did not believe that he would

be able to make an affidavit that would do any good; that in fact, he did not remember much of anything that occurred there at the time he was after the lease for Chilberg; that he had since understood that Chambers was accused of altering the bill of sale. He said that it was against his firm policy; that he didn't want to make an affidavit for either one of us and that he had informed Mrs. Chambers that he would give her an affidavit if he thought he had any information which would do her any good, but he said that he did not believe that this affidavit would do either of us any good; that he had promised her that he would give her an affidavit on the injunction hearing, I believe. I told him to go ahead, that I didn't think he could hurt me. He said that he didn't remember what took place only that he knew that he was there to get the lease. He said: "I remember Chambers gave me the bill of sale, and I called attention to the fact that there was some change in it. What happened after that I don't remember, what was said, what you said or what he said; both of you were talking, and I would not be able to swear just what happened after that. I know I got my telegram to send to Chilberg, which was what I was waiting for." I then stated that Chambers had brought suit for a half interest and I told him why I had made the remark that "we understand that"; the way I meant it was that we thoroughly understood that

558 Chambers had changed the bill of sale—that Chambers had prepared certain deeds, and that I am going to give his wife a certain interest in this claim, but that I never would recognize the forged bill of sale. Then he said that I had better call up Mrs. Chambers or go and see her, because she didn't understand the case, and that the way she had related it to him, that Dr. Chambers was to have a quarter, and he told me that I had better go and have a talk with her because she didn't understand it at all. She told me she told him he would find letters of instructions with a young man named Kirkpatrick left there by W. J. Rogers, what he wanted with him—that is, pertaining to this affidavit. I told him I guessed I had better go and see Mrs. Chambers sometime during the latter part of the day; he said he was going to; he wanted to go and see

Kirkpatrick, and get the letter and messages delivered by Rogers, and we left with the understanding that he would give her his affidavit, or he would see what the letter of instructions referred to, and if he could do so, he would give him his affidavit. He says: "I can't do you any harm, if I can't do you any good in this case, but if there is anything where I can help you, let me know and I will do so." That he would do all he possibly could for me. And with that I left. After he left, Mr. Wheeler, made the remark that he believed he would do what he said, and that was all there was to it. That was the substance of the conversation. Of my own knowledge, the first time that Dr. Chambers saw that telegram, or the first time he was informed of that telegram, to my knowledge, was during the evening of the 23d of May, when I called at his office. That was prior to the time when he first produced this deed, or called my attention to this changed deed or bill of sale. Dr. Chambers knew of the telegram from Chilberg to Rinehart prior to the 24th of May, 1906. He knew that it was in existence at that time. He did not know the contents of it. He had not seen the contents of it at that time. I had a talk with him with reference to the matter contained in the telegram referred to as the Rinehart telegram on the evening of the 23d. I had just called on Dr. Chambers that evening in a friendly way at his office.

Question. What was said with reference to the Chilberg telegram and the Bon Voyage claim at that time?

Answer. I told Doctor he ought to have kept up his assessment work in that ground because there was a telegram about some claim—

Mr. MURANE: That is objected to as having been all gone over before fully and completely in the examination of this witness, when on the stand before.

The COURT: Objection sustained.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

The WITNESS (continuing): I heard the testimony of Dr. Chambers that he never saw this telegram or knew of this telegram until after he had shown me this deed or after I had seen the deed. That is not the fact.

Cross-examination.

(Questions by Mr. MURANE:)

The WITNESS (continuing): I do not recollect that I testified yesterday that there was only one claim that was in controversy, in which I authorized or requested Dr. Chambers to procure legal advice. I did not testify yesterday that the only advice, the only thing that I ever authorized Dr. Chambers to procure legal advice on was with regard to the amended locations, or what was best to be done about the amended locations. I didn't authorize Dr. Chambers to employ attorneys. Doc told me he had Julius Thompson; that he was his attorney, and that any question I wanted to ask, he would

be glad to have him answer for me. I did not expect that to be gratis; of course, if there was any question of a law suit, I expected to pay for it. The way I understood it, I was not to pay for any advice unless I got into a law suit. I did not expect to pay lawyer's fees, when I had no need of a lawyer. We were expecting to have to bring a law suit on Number eight claim. With reference to No. 8, on the Bluestone; that was with reference also to claims 13 and 14 above Swanson's Discovery on the Bluestone. I claimed an interest in 13 and 14 Bluestone; I don't now. That is on Gold Run; yes. With Beechwood. I could not say whether I wrote to Dr. Chambers with regard to this with regard to legal advice unless I should see the letter. If you have the letter there you know whether I did
 561 or not. I haven't got all these letters in my mind at the present time. Most of the correspondence has been destroyed, so I could not say just exactly what I did write. If Doc has the letter, it will show for itself. I would consider that Dr. Chambers would not be liable to have to pay anything for attorney's fees. (Paper handed witness.) That is my letter, my handwriting; yes. This letter mentions Mr. Beechwood in there in regard to these matters.

Mr. MURANE: We will ask to have this letter marked for identification Exhibit No. 17. We now offer it in evidence.

Mr. ORTON: We have no particular objections to the letter, only we think it is wholly immaterial.

The COURT: Objection overruled.

To which ruling of the Court the defendants, and each of them, then and there excepted, which exceptions were allowed by the Court.

Whereupon the said paper was received in evidence, marked Plaintiff's Exhibit No. 17, and read to the jury, and was in the words and figures following, to wit:

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PLAINTIFF'S EXHIBIT No. 17.

Letter, March 4, 1901, Whittren to Chambers.

Ron Crawford,

J. Potter Whittren.

Crawford & Whittren.

Mining Brokers and Real Estate.

Offices:

Seattle, Wash.,
 Dawson, Y. T.,
 Nome, Alaska.

PORT CLARENCE, ALASKA, Mar. 4th, 1901.

DEAR DOCTOR: Enclosed you will find a copy of the by-laws of the Bluestone Mining District, which I think is "O. K.," but will let you know in my next letter, if they are complete, as Mr. F. W. Beechwood is going over to Teller in a day or so, and will compare them with the by-laws on record. I may have left out an article, if so, will send a copy certified by myself (as I was deputy recorder

at the time the Commissioner demanded the Bluestone Records) in my next letter.

Mr. Beechwood and myself staked No. 14 and 13 above Swanson's Discovery on Gold Run, the 10th day of Aug., 1900, and filed the same for record Aug. 16th, 1900. The Port Clarence Records show that one John Hastings and E. B. Sierer staked two placer claims to be known as the "Masking" and "Blackbird" on Matilda Creek of the Bluestone or Gold Run July 14th, and filed the same for record Sept. 6th, 1900, at 12:30 P. M., which covers No.

563 13 and 14 above Swanson's Discovery in Gold Run staked and recorded by Beechwood and myself. There was no stakes on the claim at the time we staked them and Mr. Beechwood was out there on about Sept. 24th and some one had placed stakes on mine, but not on his. Mr. Lotshaw met the parties claiming to have staked our property and told me at the time I made out his lay papers, they told him that at the time they staked the property they just put in two small willows and went up into the Koogrock District thinking the property was "N. G." He is out in Tacoma now and will be in on the first boats, that is what he told me he would do late in the fall. Now, if you wish, you can go to the Gold Hill Hotel and ask for Mr. O. L. Wold, H. A. Ring and O. N. Nelson, and they will give you their affidavit that there were no stakes on the property at the time we staked, later in the spring two or three more will be in, and one fellow who was out prospecting with Mr. Beechwood on No. 14, we can get their affidavits if needed. Now, I think the claims are "O. K.," and if you can stand your attorney off for a time, we will save money by paying him a certain stated fee, and if you will go ahead and push matters so as to clear title, it will put us on our feet. I don't believe they will put up a hard fight and we will be in possession of the claim at the time the claims are in court. I have a copy of the minutes of the miners' meeting held by the owners of property in the Bluestone District on Aug.

18th, 1900, to elect a new recorder, which I'll send if your attorney wishes. Judge Rognon arrived in Teller to establish the Port Clarence District on the 12th day of Aug. 1900, but we did not know it in the Bluestone District until the 27th of Aug. when he sent over to Port Clarence an order for an order for the Bluestone Mining Records by Mike Sullivan, we turned the books over on the 27th and the last records of the Bluestone District were made on the 27th as shown by Vol. II, of the Bluestone Mining Records, so your attorney can know just how far local laws were in force and be able to know just how to proceed. So you are authorized by myself and Beechwood to go ahead and bring action at once, write for any data you or your attorney may wish for, and I'll be glad to send you what I can find out.

Mr. Dam was up here and talked over matters with us and agrees to settle in Nome with you, as you had the papers he has pledged himself to settle with you and is going to settle on the cash basis of \$200.00, but will deduct \$20.00, and furnish or deliver to you two pairs of rubber boots Gold Seal, for you to send or deliver to us. Now, don't accept the boots unless he settles the whole bill, he will be in Nome at the time this letter reaches you and I trust you will

success, as I need the money badly. I wish you would take two porous plasters, place one on your abdomen and the other on the small of your back, and see if it would not help your kidneys, for I was knocked out in Dawson by the same thing and that was the only relief that I found, and I spent a lot of money with
565 Doctors. Will be glad to see you up here at any time.
Respectfully,

J. POTTER WHITTREN.

Redirect examination.

(Questions by Mr. COCHRAN:)

The WITNESS (continuing): I never instituted a suit on Numbers 13 and 14 Gold Run; I only owned Number Thirteen; Mr. Beechwood owned 14; that was in dispute, and on the advice of my attorneys I dropped it.

Whereupon Dr. J. J. CHAMBERS was recalled at the request of the defendants, and testified as follows:

The WITNESS: I have not the receipt which was called for from Julius Thompson.

And thereupon the testimony closed.

[*Instructions of the Court to the Jury.*]

And thereupon, the Court instructed the jury as follows:

Instructions to the Jury.

Gentlemen of the jury, this is a suit in ejectment brought by the plaintiff against the defendants. Plaintiff in his complaint claims to be the owner in fee of an undivided one-half interest in placer claim known as and called the Bon Voyage Placer Mining Claim, in the Cape Nome Mining District, in the District of Alaska, by reason of a deed of conveyance from the defendant Whittren,
566 who, he alleges, is the locator of the said mining claim, and alleges that the defendants are in possession of all of the said claim adversely to his said interest, and prays judgment for an undivided one-half interest in the said claim and for damages against the defendants in the sum of Seventy-five Thousand Dollars, for the wrongful withholding of the same.

Defendants answer separately; defendant Whittren, in his answer claims to be the owner of an undivided half interest in the said claim, and the lessor of the defendants Eadie and Waskey, and admits that he is the locator of the said claim, but denies the title of the plaintiff to the said one-half interest, and denies that the deed under which the plaintiff claims ownership of an undivided one-half interest in the said placer mining claim is, or was, his deed.

Defendant Eadie claims in his answer that he is the owner of an undivided one-half interest in the said placer mining claim, and is one of the lessees of the defendant Whittren on a part of the remaining one-half interest, and denies that the plaintiff has any

right, title or interest in or to the said claim, or to the possession thereof.

Defendant Waskey, in his answer, claims possession of the easterly two hundred and twenty feet of the said claim by reason of a lease from the defendants Eadie and Whittren, and of the remainder of the said claim with defendant Eadie by virtue of a lease from the defendants Whittren and Eadie to him and Eadie, and denies that the plaintiff has any title or right to the possession of said claim.

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2.

The first question, gentlemen of the jury, for your consideration, is whether the plaintiff is the owner in fee of an undivided one-half interest in said claim, and was so at the time of the bringing of the above-entitled suit. Upon your determination of this question practically hinges the whole case. If, from all the evidence in the case, you find that he is such owner in fee, by reason of a conveyance from the defendant Whittren, then your verdict should be for the plaintiff for the possession of an undivided one-half interest in the said claim, together with damages in a sum equal to one-half of all the gold extracted or taken from the said claim by the defendants, less the cost of mining the same.

3.

If you find, from the evidence, that the deed of April 21st, 1902, from the defendant J. Potter Whittren to the plaintiff, known as Plaintiff's Exhibit 1, was altered or changed by the consent of the parties to said deed, or by the defendant Whittren, and that the said alteration or change was made by reducing the amount of property conveyed, in such a manner that, as changed, said deed conveyed less than as when originally executed and delivered; I charge you that, under such circumstances the deed was, and is, a good and valid conveyance, if redelivered, of an undivided one-half interest in the property therein described, and was entitled to record.

4.

568 You are instructed that a change or alteration in a duly executed deed of conveyance made by a grantor or with his consent, after a delivery of the same, and when it has once become operative, does not make the deed void; therefore, I instruct you, gentlemen of the jury, if you believe from all the evidence in this case, that the defendant Whittren made a change in the instrument offered in evidence by the plaintiff, whereby the quantity of interest going to Chambers was reduced from a three-quarter interest to a one-half interest, or if you believe the said change was made with Whittren's consent, then I instruct you that the said deed remains valid in its changed or altered form, and if you further find that it was as changed and purporting to convey the undivided one-half of said claim, delivered to the plaintiff by defendant Whittren, you must then find the plaintiff to be the owner in fee and entitled to the possession of an undivided one-half interest in the said

claim, together with damages computed according to the rule hereinbefore stated.

5.

You are instructed that it is the law, gentlemen of the jury, that a lease for a term of years on a mining claim is personal property, and under our Alaska code, not a conveyance of land or real property such as under the circumstances of this case, raises the question of the priority of record between any deeds from Whittren and the leases from him to Waskey and to Waskey and Eadie; therefore, if from all the evidence in this case you find that the defendant Whittren had parted with his entire title to the said claim by conveyances to defendant Eadie and plaintiff Chambers, prior to 569 the letting or giving of the two leases offered in evidence, I instruct you that, under the law, the question of innocent purchaser does not arise in this case, and you need not consider the question of whether the plaintiff Chambers recorded his deed, or whether the defendants Waskey and Eadie had notice of the plaintiff's title at the date of the lease to them jointly.

6.

You are instructed, gentlemen of the jury, that where a lessee takes a lease from a lessor who has no title to the ground leased, the lessee acquires no interest in the ground by reason of the lease; so, if you find that the plaintiff is the owner in fee of an undivided one-half interest in the said Bon Voyage Placer Claim by reason of a conveyance from defendant Whittren, dated April 21st, 1902, originally of the undivided three-fourths thereof, now of the undivided one-half thereof, then I instruct you that the defendants Eadie and Waskey have no lease on the said undivided one-half interest in said claim, nor has Waskey alone any lease, which is of any legal force and effect as against the plaintiff, but the plaintiff must, regardless of said leases, recover possession of his full undivided one-half interest in the said claim and damages as hereinbefore and hereinafter stated.

7.

The Court instructs the jury, that when a party to an action claims under an instrument in writing and the instrument is attacked by the adverse party with evidence tending to show an alteration in the instrument in a material part, and is admitted 570 for the purpose of rebutting the validity of the instrument, the burden is then cast upon the party relying upon the instrument, of accounting for the alteration sought to be proved by his adversary.

If the plaintiff, then, in this case, has accounted for the alteration in the deed upon which he founds his right of recovery by showing by a preponderance of evidence that the alteration was made by the defendant Whittren, or with his consent, then the plaintiff will be entitled to a verdict at your hands for the undivided one-half of the premises in controversy, and damages; but otherwise, your verdict should be for the defendants.

8.

You are instructed that the memorandum signed by Chambers and dated May 24th, 1906, introduced in evidence by the defendants, marked Defendants' Exhibit "D," cannot, under the issues of this case, be considered by you as any proof or evidence of title to any portion of the said Bon Voyage Claim in the defendant Whittren.

9.

There has been some testimony introduced in the case during the trial on the question of assessment work, or of money expended or not expended by the plaintiff Chambers and the defendant Whittren, on the said Bon Voyage claim.

I instruct you, gentlemen of the jury, that all of that sort of testimony was admitted for the purpose of proving the quantity of interest in the Bon Voyage Claim first held by Dr. Chambers under the deed of April 21st, 1902, from Whittren, by showing the
571 relationship, acts and dealings between the plaintiff and defendant Whittren, and I instruct you that the question of contribution for the annual work or assessment work done on the said Bon Voyage Claim since its location does not enter into your consideration, except for the above purpose.

You are also instructed that the question of abandonment is not an issue in this case, and any testimony introduced tending to show an abandonment by the plaintiff of any rights theretofore claimed by him should not be considered by you for that particular purpose.

10.

Gentlemen of the jury, if you find from all the evidence that the plaintiff is entitled to recover in this action, in measuring his damage, I instruct you that you must first determine, from all the evidence in the case, the gross amount of gold taken or extracted by the defendants from the said Bon Voyage Claim between the 11th day of June, 1906, and up to the present time, and deduct from the said gross amount the cost and expense of mining the same, as found by you from all the testimony, and award to the plaintiff damages in a sum equivalent to one-half of the remainder.

11.

Now, I add, as a final special instruction for your guidance, that if you find for the plaintiff, you will find for the undivided one-half of the Bon Voyage Claim in controversy against all the defendants, and for damages against them all; but, if you find against the plaintiff, you will find for the defendants jointly for all the premises in controversy.

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12.

The jury are instructed that you are the judges of the effect and value of the evidence addressed to you. You are, however, instructed:

1. That your power of judging the effect of the evidence is not

arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

2. That you are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds.

3. That a witness wilfully false in one part of his testimony may be distrusted in others.

4. That oral admissions of a party are to be viewed with caution.

5. That in civil cases, the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of the evidence.

13.

In civil cases, the affirmative of the issue shall be proved by the party alleging it, as hereinbefore said, and when the evidence is contradictory, your finding shall be in accordance with the preponderance of the evidence. You are instructed that the preponderance of the evidence is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining on which side is the preponderance of evidence, you should take into consideration the opportunity of the several witnesses for seeing and knowing the things to which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the evidence, facts and circumstances proved on the trial, and from all these circumstances determine on which side is the weight and preponderance of the evidence.

You will take with you to your jury-room two forms of verdict drawn in conformity with the law. When you have retired and agreed upon your verdict, you should sign, by the hand of your foreman, selected by yourselves, the one upon which you unanimously agree, and return it into court as your verdict in this case.

In conformity with the law of Alaska, you will be allowed to take with you to the jury-room the pleadings setting forth the facts in the case, and the exhibits in the case.

Let the bailiffs be sworn. You may now retire, gentlemen, to deliberate upon your verdict.

[Defendants' Exceptions to the Instructions of the Court to the Jury.]

And thereupon, in the presence of the jury, and before the jury had retired to deliberate upon *your* verdict, the following exceptions to the instructions of the Court to the jury were taken by the defendants, and each of them, and the same were then and there allowed by the Court:

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First Exception.

The defendants except to Instruction numbered 2, given by the Court to the jury, which said instruction reads as follows:

"The first question, gentlemen of the jury, for your consideration, is whether the plaintiff is the owner in fee of an undivided one-half interest in the said claim, and was so at the time of the bringing of the above-entitled suit. Upon your determination of this question practically hinges the whole case. If from all the evidence in the case, you find that he is such owner in fee, by reason of a conveyance from the defendant Whittren, then your verdict should be for the plaintiff for the possession of an undivided one-half interest in the said claim, together with damages in a sum equal to one-half of all the gold extracted or taken from the said claim by the defendants, less the cost of mining the same."

Second Exception.

Said defendants except to said instruction numbered 3, given by the Court to the jury, which said instruction reads as follows:

"If you find from the evidence that the deed of April 21st, 1902, from the defendant J. Potter Whittren to the plaintiff, known as Plaintiff's Exhibit 1, was altered or changed by the consent of the parties to said deed, or by the defendant Whittren, and that the said alteration or change was made by reducing the amount of property conveyed, in such a manner, that, as changed, said deed conveyed less than as when originally executed and delivered, I charge

you that, under such circumstances, the deed was, and is,
 575 a good and valid conveyance, if re-delivered, of an undivided one-half interest in the property therein described, and was entitled to record."

Third Exception.

Defendants except to instruction numbered 4 given by the Court to the jury, which said instruction reads as follows:

"You are instructed that a change or alteration in a duly executed deed of conveyance made by a grantor or with his consent, after a delivery of the same, and when it has once become operative, does not make the deed void; therefore, I instruct you, gentlemen of the jury, if you believe from all the evidence in this case, that the defendant Whittren made a change in the instrument offered in evidence by the plaintiff, whereby the quantity of interest going to Chambers was reduced from a three-quarter interest to a one-half interest, or if you believe the said change was made with Whittren's consent, then I instruct you that the said deed remains valid in its changed or altered form, and if you further find that it was as changed and purporting to convey the undivided one-half of said claim, delivered to the plaintiff by defendant Whittren, you must then find the plaintiff to be the owner in fee and entitled to

the possession of an undivided one-half interest in the said claim, together with damages computed according to the rule hereinbefore stated."

Fourth Exception.

Defendants except to that portion of instruction numbered 576 5 wherein the Court instructed the jury that a lease for a term of years under the Alaska Code was not a conveyance of land or real property, such as, under the circumstances of this case, raises the question of priority of record between any deeds from Whittren and the lessees, from him to Waskey and to Waskey and Eadie.

Fifth Exception.

Defendants except to that portion of instruction numbered 5, wherein the Court instructed the jury as follows:

"If from all the evidence in this case you find that the defendant Whittren had parted with his entire title to the said claim by conveyances to defendant Eadie and plaintiff Chambers, prior to the letting or giving of the two leases offered in evidence, I instruct you that, under the law, the question of innocent purchaser does not arise in this case, and you need not consider the question of whether the plaintiff Chambers recorded his deed, or whether the defendants Waskey and Eadie had notice of the plaintiff's title at the date of the lease to them jointly."

Sixth Exception.

Said defendants except to that portion of instruction numbered 6, which reads as follows:

"You are instructed, gentlemen of the jury, that where a lessee takes a lease from a lessor who has no title to the ground leased, the lessee acquires no interest in the ground by reason of the lease."

Seventh Exception.

Said defendants except to that portion of instruction numbered 6, which reads as follows:

577 "So, if you find that the plaintiff is the owner in fee of an undivided one-half interest in the said Bon Voyage Placer Claim by reason of a conveyance from defendant Whittren, dated April 21st, 1902, originally of the undivided three-fourths thereof, now of the undivided one-half thereof, then I instruct you that the defendants Eadie and Waskey have no lease on the said undivided one-half interest in said claim, nor has Waskey along any lease which is of any legal force and effect as against the plaintiff, but the plaintiff must, regardless of said leases, recover possession of his full undivided one-half interest in the said claim and damages as hereinbefore and hereinafter stated."

Eighth Exception.

The said defendants except to that portion of instruction numbered 7, which reads as follows:

"If the plaintiff, then, in this case, has accounted for the alteration in the deed upon which he founds his right of recovery, by showing by a preponderance of evidence that the alteration was made by the defendant Whittren, or with his consent, then the plaintiff will be entitled to a verdict at your hands for the undivided one-half of the premises in controversy, and damages."

Ninth Exception.

Defendants except to instruction numbered 8 given by the Court to the jury, reading as follows:

"You are instructed that the memorandum signed by Chambers and dated May 24th, 1906, introduced in evidence by the defendants, marked Defendants' Exhibit 'D,' cannot, under the 578 issues of this case, be considered by you as any proof of evidence of title to any portion of the said Bon Voyage Claim in the defendant Whittren."

Tenth Exception.

Defendants except to that portion of instruction numbered 9, which reads as follows:

"You are also instructed that the question of abandonment is not an issue in this case, and any testimony introduced tending to show an abandonment by the plaintiff of any rights theretofore claimed by him, should not be considered by you for that particular purpose."

Eleventh Exception.

Defendants except to that portion of instruction numbered 11, which reads as follows:

"Now, I add, as a final special instruction, for your guidance, that if you find for the plaintiff, you will find for the undivided one-half of the Bon Voyage Claim in controversy against all the defendants."

[*Defendants' Exceptions to the Refusal of the Court to Give Certain Instructions.*]

And thereupon, in the presence of the jury, and before the jury had retired to deliberate upon their verdict, the following exceptions, to the refusal of the Court to give to the jury instructions requested by the defendants, were taken by the defendants and each of them, and the same were then and there allowed by the Court:

First Exception.

Defendants except to the refusal of the Court to give the following instruction:

579 "The plaintiff claims title to an undivided half interest in the Bon Voyage placer mining claim, under an instrument bearing date the 21st day of April, 1902, and it is conceded by all the parties to this action that this instrument has been altered in a material part since the date of its execution and acknowledgment, and that this alteration is apparent upon the face of the instrument, and the Court so instructs you."

Second Exception.

Defendants except to the refusal of the Court to give the following instruction:

"The Court instructs the jury that a party producing a writing as genuine, which has been altered, or appears to have been altered, after its execution or making, in a part material to the question in dispute, shall account for the appearance or alteration."

Third Exception.

Defendants except to the refusal of the Court to give the following instruction:

"The Court instructs the jury that if they shall find that the plaintiff has shown by a preponderance of evidence that the alteration was made by or with the consent of the defendant Whittren, then they may consider the said instrument as evidence of plaintiff's title to the premises claimed, but not otherwise."

And thereafter the jury in this case came into court, answered at roll-call, and rendered the following verdict:

580 In the District Court, District of Alaska, Second Division.

No. —.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and FRANK H. WASKEY,
Defendants.

Verdict [in Bill of Exceptions].

We, the jury duly empanelled and sworn to try the above-entitled cause, find for the plaintiff and against the defendants, and that the plaintiff is the owner in fee and entitled to the possession of an

undivided one-half interest in the Bon Voyage Claim, described as follows, to wit:

Commencing at the initial stake, which is situated about 1500 feet in a southerly direction from the upper end line of creek claim No. 3 below on Newton Gulch, a tributary of Dry Creek, said stake being in the north end line of said claim; thence 330 feet in a westerly direction, and parallel to said Newton Gulch to corner stake No. 1; thence 1320 feet in a southerly direction and at right angles to corner stake No. 2; thence 660 feet in an easterly direction to corner stake No. 3; thence 1320 feet in a northerly direction to corner stake No. 4; thence 330 feet to initial stake or place of beginning; said claim being situated on the divide known as Gold Hill, between Newton Gulch and Nome River, and next to
581 a certain Bench Claim known as Gold Hill Claim No. 1, and containing about twenty acres of placer mining ground.

And we further find that the plaintiff is entitled to damages against the defendants, Andrew Eadie, J. Potter Whittren and Frank H. Waskey, in the sum of \$20,441.83, Twenty thousand four hundred forty-one 83/100 Dollars.

Dated this 3d day of September, 1907.

FLOYD W. DAVIS,
Foreman.

Whereupon, the said verdict was filed and the jury discharged.

The foregoing constitutes all the testimony and all the proceedings given and had upon the trial of the above-entitled cause.

[*Prayer for Settlement, etc., of Bill of Exceptions.*]

Now, in the furtherance of justice and that right may be done, the defendants present the foregoing as their bill of exceptions in this case and pray that the same may be settled and allowed, signed and certified by the Court as allowed by law.

F. E. FULLER,
O. D. COCHRAN,
Attorneys for Defendant J. Potter Whittren.
O. D. COCHRAN,
Attorney for Defendant Andrew Eadie.
ALBERT FINK,
IRA D. ORTON,
Attorneys for Defendant Frank H. Waskey.

582 Service of a copy of the foregoing Bill of Exceptions this 10th day of September, 1907, admitted.

WILLIAM A. GILMORE,
Of Attorneys for Plaintiff.

[*Order Settling, etc., Bill of Exceptions.*]

The foregoing bill of exceptions having been served, filed and presented for settlement within the time allowed by law and extensions thereof made by orders entered of record, and an order having been made and entered herein at the same term as said cause was tried that this bill of exceptions may be settled at this term of court, being the next succeeding term, and said bill being now true and correct is now settled and allowed.

Done at Nome, Alaska, December 14, 1907, being a regular day in the special term commencing October 10, 1907.

ALFRED S. MOORE,
Judge District Court, District of Alaska,
Second Division.

[Endorsed:] #1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Bill of Exceptions, Vol. I. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Dec. 11, 1907. Jno. H. Dunn, Clerk. By — — —, Deputy. L.

#1629. In United States District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, et al., Defendants. Bill of Exceptions, Vol. 2. Filed 583 in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Dec. 11, 1907. Jno. H. Dunn, Clerk. By — — —, Deputy. L.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,
vs.
ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

Assignment of Errors.

Come now the defendants, Andrew Eadie, J. Potter Whittren and F. H. Waskey, and assign the following errors as having been committed by the Court upon the trial and in the proceedings had in the above-entitled action, upon which said defendants do, and will rely, upon their writ of error to the United States Circuit Court of Appeals for the Ninth Circuit:

1.

The Court erred in overruling the objection of the defendants to the introduction in evidence at the trial of said cause of the deed from J. Potter Whittren to J. J. Chambers, and in admitting the

same in evidence, said deed being Plaintiff's Exhibit Number One, and in the words and figures following, to wit:

584 "Know all men by these presents: That J. Potter Whittren, of Nome City, Alaska, the party of the first part, for and in consideration of the sum of One (\$1.00) Dollars Lawful — of the United States of America, to him in hand paid by J. J. Chambers of the same place, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, an undivided one-half ($\frac{1}{2}$) interest in the following described property: Bench Claim known as the "Rocky Bench" opposite No. 2 in "Extra Dry," a tributary to Nome River, staked Jan. 1st, 1902. The "Bon Voyage" Bench Claim on the left limit of Newton Gulch opposite No. 3, about 1500 ft. to the southeast, staked Jan. 1st, 1902. No. 5 $\frac{1}{2}$ Little Creek, a tributary to Snake River, said 5 $\frac{1}{2}$ being a fraction at No. 5, below Discovery in Little Creek, all of the above being in Cape Nome Recording District, District of Alaska, and staked by J. Potter Whittren.

To have and to hold the same to the said party of the second part, his executors, administrators and assigns, forever. And he does, for his heirs, executors, administrators, covenant and agree to and with the said party of the second part, executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

585 In Witness Whereof, I have hereunto set my hand and seal the 21st day of April, in the year of our Lord one thousand nine hundred two, 1902.

J. POTTER WHITTREN. [SEAL.]

Signed, sealed and delivered in presence of,
F. E. FULLER.

TERRITORY OF ALASKA,
Precinct of Nome, ss:

This is to certify, that on this 21st day of April, A. D. 1902, before me, F. E. Fuller, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came J. Potter Whittren, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and Official Seal, the day and year in this certificate first above written.

[NOTARIAL SEAL.]

F. E. FULLER,
*Notary Public in and for the Territory
of Alaska, Residing at Nome."*

2.

The Court erred in overruling the objections of the defendants to the introduction of Plaintiff's Exhibit Number Two, and in admitting the same in evidence; the said Exhibit being the file marks on Plaintiff's Exhibit Number One, and in the words and figures following, to wit:

"35972. Bill of Sale. Prepared by Crawford & Whittren, Mining Brokers. Nome, Alaska. From J. Potter Whittren to J. J. Chambers. Dated —, 190—. Territory of Alaska, District of —, ss. Filed for record at request of J. J. Chambers, Jul., 20, 1906, on the — day of — at minutes past 2 P. M., and recorded in volume 163 of Deeds, page 387. Records of Nome District Alaska. F. E. Fuller, Recorder, By F. R. Cowden, Deputy. 4-3-\$2.85."

3.

The Court erred in denying the motion of the defendants, made at the close of the testimony of the witness, J. J. Chambers, called as a witness for the defendants, to strike from the testimony in the case the deed introduced by plaintiff in his case in chief, on the grounds that the said deed was not witnessed or acknowledged as required by law.

4.

The Court erred in denying the motion of the defendants to strike from the record the said deed (Plaintiff's Exhibit Number One) introduced in evidence, on the ground that the uncontradicted testimony showed that the deed had been altered in a material part four years after the same had been acknowledged.

5.

The Court erred in denying the motion of the defendants to strike from the record the alleged acknowledgement of said deed.

6.

The Court erred in sustaining the objection of the plaintiff to the introduction in evidence of the contract between Whittren and Eadie, the same being marked Defendants' Exhibit "F," for identification.

7.

The Court erred in denying the motion of the defendants to strike from the record the two letters written by Chambers to Whittren and marked respectively Plaintiff's Exhibit 10 and Plaintiff's Exhibit 11.

8.

The Court erred in sustaining the objection of the plaintiff to the admission of the testimony of the witness Waskey, to the effect that the witness executed the lease, (Exhibit "G"—the lease and contract June 20th, 1906, and also the lease and contract, Exhibit "H," on

the 20th day of June, 1906, without any notice or knowledge whatsoever as to any claim of the plaintiff Chambers to the premises or any portion thereof, or any interest therein; that he executed said leases and contracts for a valuable consideration, and immediately after the execution thereof, entered into the actual occupancy and possession of the mine under and by virtue of the leases and contracts referred to.

9.

The Court erred in sustaining the objection of the plaintiff to the admission of the testimony of the witness Waskey to the effect that prior to any knowledge he had of Dr. Chambers' claim he entered, under the leases referred to in the last preceding assignment, and expended money in opening up and developing the mine.

588

10.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Waskey:

Q. "How much money did you expend in good faith under and by virtue of the leases and contracts introduced in evidence here—that is, how much money did you expend, in good faith, under the leases and contracts that you entered into possession under on the Bon Voyage, prior to the time that you had any notice or knowledge whatsoever of the claim of Dr. Chambers?"

11.

The Court erred in sustaining the objection of the plaintiff to the admission of the testimony of the witness Waskey to the effect that after he had obtained the leases and contracts (Exhibits "G" and "H") and had entered into possession of and begun to mine this ground, that two separate suits were brought against him by third parties claiming portions of this ground, and particularly the portion of the ground where the pay was, being suits under subsequent locations, and that these suits were still pending and undetermined; Chambers as well as adverse to the witness, and the parties from whom the witness got his leases; that he had reasonably expended large sums of money in these cases, in excess of five thousand dollars, and had incurred other expenses in connection therewith, for which he had become liable in excess of five thousand dollars; and that such expenditures were necessary, reasonable and proper for the purpose of defending and protecting his title and possession of the premises as against these third parties, who were in no way connected with the plaintiff, but were antagonistic to him; and further, that as a condition to the leases which he holds, he agreed to defend and pay part of the expenses of defending the title to the Bon Voyage claim against the claims of third parties claiming ownership in the ground adverse to the title of Whittren, and the alleged title of the plaintiff in this case.

589

12.

The Court erred in sustaining the objection of the plaintiff to the

admission of the testimony of the witness Chambers, on his examination, to the following effect:

That on the 24th day of June, 1906, or prior thereto the witness was notified by the defendant Whittren of the leases of the defendant Waskey, of the terms upon which the leases were given to the defendant Waskey; that he made no objection in any manner to the giving of the said leases, nor the leasing of said ground to the defendant Waskey or the defendant Eadie.

13.

The Court erred in sustaining the objection of the plaintiff to the admission of the testimony of the witness Chambers, called as a witness on behalf of the defendants, to the following effect:

590 That it was agreed by the witness that, inasmuch, as the title stood in the name of Whittren, and inasmuch, as Whittren was here in the country, and the witness was to remain outside in Seattle, that it was agreed between himself and Whittren, that Whittren was to manage and operate the property for their general benefit and to make and execute such contracts and leases with reference thereto as in his judgment was necessary and proper; that pursuant to that agreement Whittren did execute the leases introduced by the defendants Waskey and Eadie in this case; that this witness had knowledge of the execution of these leases but did not object to them, but on the contrary approved of them.

14.

The Court erred in sustaining the objection of the plaintiff to the introduction of the letter marked for identification Defendants' Exhibit "M," being a letter from the plaintiff Chambers to the defendant Whittren.

15.

That the Court erred in denying the motion of the defendants to strike from the record the testimony of the witness Thomas Harrison.

16.

The Court erred in giving the jury the following instruction:
"The first question, gentlemen of the jury, for your consideration, is, whether the plaintiff is the owner in fee of an undivided
591 one-half interest in the said claim, and was so at the time of the bringing of the above entitled suit. Upon your determination of this question practically hinges the whole case. If, from all the evidence in the case, you find that he is such owner in fee, by reason of a conveyance from the defendant Whittren, then your verdict should be for the plaintiff for the possession of an undivided one-half interest in the said claim, together with damages in a sum equal to one-half of all the gold extracted or taken from the said claim by the defendants, less the cost of mining the same.

17.

The Court erred in giving the jury the following instruction:

"If you find from the evidence that the deed of April 21st, 1902,

from the defendant J. Potter Whittren to the plaintiff, known as Plaintiff's Exhibit 1, was altered or changed by the consent of the parties to said deed, or by the defendant Whittren, and that the said alteration or change was made by reducing the amount of property conveyed, in such a manner, that, as changed, said deed conveyed less than as when originally executed and delivered. I charge you, that, under such circumstances, the deed was, and is, a good and valid conveyance, if re-delivered, of an undivided one-half interest in the property therein described, and was entitled to the record."

18.

592 The Court erred in giving the jury the following instruction:

"You are instructed that a change or alteration in a duly executed deed of conveyance, made by a grantor, or with his consent, after a delivery of the same, and when it has once become operative, does not make the deed void; therefore, I instruct you, gentlemen of the jury, if you believe, from all the evidence in this case, that the defendant Whittren made a change in the instrument offered in evidence by the plaintiff, whereby the quantity of interest going to Chambers was reduced from a three-quarters interest to a one-half interest, or if you believe the said change was made with Whittren's consent, then I instruct you, that the said deed remains valid in its changed or altered form, and if you further find that it was, as changed and purporting to convey the undivided one-half of said claim, delivered to the plaintiff by the defendant Whittren, you must then find the plaintiff to be the owner in fee and entitled to the possession of an undivided one-half interest in the said claim, together with damages computed according to the rule hereinbefore stated."

19.

The Court erred in giving to the jury that portion of instruction numbered five in the Court's instructions whereby the Court instructed the jury, "that a lease for a term of years, under the Alaska Code, was not a conveyance of land, or real property, such, as under the circumstances of this case, raises the question of priority
593 of record between any deeds from Whittren and the lessees, from him to Waskey and to Waskey and Eadie."

20.

The Court erred in giving to the jury that portion of instruction numbered five in the instructions of the Court to the jury, which reads as follows:

"If from all the evidence in this case, you find that the defendant Whittren had parted with his entire title to the said claim by conveyances to defendant Eadie and the plaintiff Chambers, prior to the letting or giving of the two leases offered in evidence, I instruct you that, under the law, the question of innocent purchaser does not arise in this case, and you need not consider the question of whether the plaintiff Chambers recorded his deed, or whether the

fendant- Waskey and Eadie had notice of the plaintiff's title at the date of the lease to them jointly."

21.

The Court erred in giving to the jury that portion of instruction numbered six in the instructions of the Court to the jury, which reads as follows:

"You are instructed, gentlemen of the jury, that where a lessee takes a lease from a lessor, who has no title to the ground leased, the lessee acquires no interest in the ground by reason of the lease."

22.

The Court erred in giving to the jury that portion of instruction numbered six in the instructions of the Court to the jury, which reads as follows:

"So, — you find that the plaintiff is the owner in fee of an undivided one-half interest in the said Bon Voyage Placer Claim, by
594 reason of a conveyance from defendant Whittren, dated April 21st, 1902, originally of the undivided three-fourths thereof, now of the undivided one-half thereof, then I instruct you that the defendants Eadie and Waskey have no lease on the said undivided one-half interest in said claim, nor has Waskey alone any lease, which is of any legal force and effect as against the plaintiff, but the plaintiff must, regardless of said leases, recover possession of his full undivided one-half interest in the said claim, and damages, as hereinbefore and hereinafter stated."

23.

The Court erred in giving to the jury that portion of instruction numbered seven in the instructions of the Court to the jury, which reads as follows:

"If the plaintiff, then, in this case, has accounted for the alteration in the deed upon which he founds his right of recovery, by showing by a preponderance of evidence that the alteration was made by the defendant Whittren, or with his consent, then the plaintiff will be entitled to a verdict at your hands for the undivided one-half of the premises in controversy, and damages."

24.

The Court erred in giving to the jury the following instruction:

"You are instructed that the memorandum signed by Chambers and dated May 24th, 1906, introduced in evidence by the defendants, marked Defendant's Exhibit "D," cannot, under the issues of
595 this case, be considered by you as any proof of evidence of title to any portion of the said Bon Voyage Claim in the defendant Whittren."

25.

The Court erred in giving the jury that portion of instruction numbered nine in the instructions of the Court to the jury, which reads as follows:

"You are also instructed that the question of abandonment is not an issue in this case, and any testimony introduced tending to show an abandonment by the plaintiff of any rights theretofore claimed by him, should not be considered by you for that particular purpose."

26.

The Court erred in giving to the jury that portion of the instruction numbered eleven in the instructions given by the Court to the jury, which reads as follows:

"Now, I add, as a final special instruction, for your guidance, that, if you find for the plaintiff, you will find for the undivided one-half of the Bon Voyage Claim in the Controversy against all the defendants."

27.

The Court erred in refusing to give to the jury the following instruction, requested to be given by the defendants:

"The plaintiff claims title to an undivided half interest in the Bon Voyage placer mining claim, under an instrument bearing date the 21st day of April 1902, and it is conceded by all the parties to this action that this instrument has been altered in a material part since the date of its execution and acknowledgment, and that this alteration is apparent upon the face of the instrument, and the Court so instructs you."

28.

The Court erred in refusing to give to the jury the following instruction requested to be given by the defendants:

"The Court instructs the jury that a party producing a writing as genuine, which has been altered, or appears to have been altered after its execution or making, in a part material to the question in dispute, shall account for the appearance or alteration."

29.

The Court erred in refusing to give to the jury the following instruction, requested to be given by the defendants:

"The Court instructs the jury that if they shall find that the plaintiff has shown by a preponderance of evidence that the alteration was made by or with the consent of the defendant Whittren, then they may consider the said instrument as evidence of plaintiff's title to the premises claimed, but not otherwise."

597 Wherefore, the said defendants pray that said judgment be reversed, and that they be restored to all things they have lost thereby.

F. E. FULLER,
O. D. COCHRAN,
Attorneys for Defendant Whittren.
O. D. COCHRAN,
Attorney for Defendant Eadie.
IRA D. ORTON,
ALBERT FINK,
Attorneys for Defendant Waskey.

[Endorsed:] #1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. J. Potter Whittren, Andrew Eadie, and F. H. Waskey, Defendants. Assignment of Errors. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Dec. 19, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. (Z) F. E. Fuller and O. D. Cochran, Att'ys for Def't Whittren, O. D. Cochran, Att'y for Def't Eadie, Ira D. Orton and Albert Fink, Att'ys for Def't Waskey.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

J. POTTER WHITTREN, ANDREW EADIE, and F. H. WASKEY, Defendants.

598

Petition for Writ of Error.

J. Potter Whittren, Andrew Eadie and F. H. Waskey, defendants in the above-entitled cause, feeling themselves aggrieved by the verdict of the jury and the judgment entered upon said verdict on October 12th, 1907, come now, by the undersigned, their attorneys, and petition the said Court for an order allowing said defendants to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided. And that also an order be made fixing the amount of security which said defendants shall give and furnish upon said writ of error, and that, upon the giving of such security, all further proceedings in this court be suspended and stayed until the termination of said writ of error by the said Circuit Court of Appeals, and your petitioners will ever pray.

F. E. FULLER,

O. D. COCHRAN,

Attorneys for Defendant Whittren.

O. D. COCHRAN,

Attorney for Defendant Eadie.

ALBERT FINK,

IRA D. ORTON,

Attorneys for Defendant Waskey.

[Endorsed:] #1629. In District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren, and F. H. Waskey, Defendants. Petition in Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 19, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. (Z) F. E. Fuller and O. D. Cochran, Att'ys for Def't Whittren, O. D. Cochran, Att'y for Def't Eadie. Ira D. Orton and Albert Fink, Att'ys for Def't Waskey.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

Order Allowing Writ of Error.

Now, on the 19th day of December, 1907, it is ordered that a writ of error be allowed as prayed for in the petition for writ of error heretofore filed by the above-named defendants in this cause, and that the said defendants give a bond in the sum of Ten Thousand Dollars, which shall operate as a supersedeas.

Done at Nome, Alaska, December 19th, 1907.

ALFRED S. MOORE,

*Judge of the District Court for the District
of Alaska, Second Division.*

[Endorsed:] #1629. In District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew
600 Eadie, J. Potter Whittren, and F. H. Waskey, Defendants.
Order Allowing Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Dec. 19, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. Voi. 6, Orders and Judgments, p. 12. McB.

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

Bond on Writ of Error.

Know all men by these presents, that we, Andrew Eadie, J. Potter Whittren and F. H. Waskey, as principals, and T. M. Gibson and R. D. Adams, as sureties, are held and firmly bound unto J. J. Chambers, plaintiff in the above-entitled action, in the sum of Ten Thousand Dollars, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 19th day of December, 1907.

Whereas, lately, at a session of the above-entitled Court, in an action pending in said court between J. J. Chambers,
601 plaintiff, and Andrew Eadie, J. Potter Whittren and F. H. Waskey, defendants, a judgment was, on the 12th day of October, 1907, rendered and entered in favor of said plaintiff and

against said defendants, and said defendants having obtained from the said District Court an order allowing a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to view said judgment, and a citation to said J. J. Chambers, is about to be issued citing and admonishing *her* to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California.

Now, therefore, the condition of the above obligation is such, that if the said Andrew Eadie, J. Potter Whittren and F. H. Waskey, defendants, shall prosecute their said writ of error to effect and answer all damages and costs, if they fail to make their plea good, then this obligation shall be void; otherwise, it shall remain in full force and effect.

J. POTTER WHITTREN,	[SEAL.]
ANDREW EADIE,	[SEAL.]
By O. D. COCHRAN,	[SEAL.]
<i>Att'y in Fact,</i>	
J. M. CRABTREE,	
<i>Principals.</i>	
T. M. GIBSON,	[SEAL.]
R. D. ADAMS,	[SEAL.]
— — — — —	[SEAL.]
<i>Sureties</i>	

602 UNITED STATES OF AMERICA,
District of Alaska, ss:

T. M. Gibson and R. D. Adams, being first duly sworn, each deposes and says, that he is one of the sureties on the foregoing bond; that he is worth the sum of Ten Thousand Dollars, over and above all debts and liabilities and exclusive of property exempt from execution.

T. M. GIBSON.
R. D. ADAMS.

Subscribed and sworn to before me this 19th day of December, 1907.

[NOTARY SEAL.]

INEZ HUNTOON,
Notary Public for Alaska.

The within bond is hereby approved this 19th day of December, 1907.

ALFRED S. MOORE,
*Judge of the District Court for District
of Alaska, Second Division.*

[Endorsed:] #1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren, and F. H. Waskey, Defendants. Bond on Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 19, 1907. Jno. H. Dunn, Clerk. By — — — — —, Deputy. F. E. Fuller and O. D.

603 Cochran, Att'ys for Def't Whittren. O. D. Cochran, Att'y for Def't Eadie. Ira D. Orton and Albert Fink, Att'ys for Def't Waskey. Civil Bonds #4, Page 19.

[*Writ of Error (Lodged Copy).*]

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

Writ of Error.

UNITED STATES OF AMERICA,
District of Alaska, ss:

The President of the United States of America to the Honorable the Judge of the United States District Court for the District of Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the Judgment of a plea which is in the said District Court before you, between J. J. Chambers, plaintiff, and Andrew Eadie, J. Potter Whittren and F. H. Waskey, defendants, a manifest error hath happened to the great damage of the said Andrew Eadie, J. Potter Whittren and F. H. Waskey, plaintiffs, in error, as by their complaint appears.

604 We, being willing that error, if any hath been, ~~should~~ be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, and all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, in the City and County of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said Circuit on the 17th day of January, 1908, and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of December, 1907.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the clerk's office, at Nome, Alaska, this 19th day of December, 1907.

JNO. H. DUNN,

*Clerk of the United States District Court for
the District of Alaska, Second Division.*

Allowed this 19th day of December, 1907.

[SEAL.]

ALFRED S. MOORE,
*Judge of the United States District Court
for the District of Alaska, Second Division.*

605 The foregoing copy of writ of error lodged in the clerk's
office for the Defendant in Error this 19th day of December,
1907.

JNO. H. DUNN, *Clerk.*

[Endorsed:] #1629. In the District Court for the District of
Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew
Eadie, J. Potter Whittren, and F. H. Waskey, Defendants. Writ
of Error. Lodged Copy. Filed in the Office of the Clerk of the
Dist. Court of Alaska, Second Division, at Nome. Dec. 19, 1907.
Jno. H. Dunn, Clerk. By ———, Deputy. McB.

[Præcipe for Transcript of Record.]

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

Præcipe.

To the Clerk of the above-entitled Court:

You are requested to take a transcript of record to be filed in the
United States Circuit — of Appeals for the Ninth Circuit,
606 pursuant to a writ of error allowed in the above-entitled cause,
and to include in such transcript of record, the following:

All pleadings filed in the case.

The verdict, Judgment, Order fixing Supersedeas,

Bill of Exceptions, Assignment of Errors,

Bond on Writ of Error, Order Allowing Writ of Error,

Lodged Copy of Writ of Error.

Respectfully,

IRA D. ORTON,

ALBERT FINK,

Of Attorneys for Plaintiffs in Error.

[Endorsed:] #1629. In the District Court for the District of
Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew
Eadie, J. Potter Whittren and F. H. Waskey, Defendants. Præcipe
for Transcript on Writ of Error. Filed in the Office of the Clerk
of the Dist. Court of Alaska, Second Division, at Nome. Dec. 20,
1907. Jno. H. Dunn, Clerk. By ———, Deputy. O. D.
Cochran, Att'y for Def't Eadie, F. E. Fuller and O. D. Cochran,
Att'ys for Def't Whittren, Ira D. Orton and Albert Fink, Att'ys
for Def't Waskey. McB.

607 [Clerk's Certificate to Transcript of Record.]

In the District Court for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

Clerk's Certificate.

I, John H. Dunn, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 539, both inclusive, are a true and exact copy of the Complaint, Summons, Answer of defendant J. Potter Whittren, Amended Complaint, Demurrer of defendant Andrew Eadie to Complaint, Demurrer of defendant Frank H. Waskey to Complaint, Demurrer of defendant J. Potter Whittren to Complaint, Minutes of Court of Nov. 17, 1906, Second Amended Complaint, Answer of defendant J. Potter Whittren to Second Amended Complaint, Demurrer to Further Answer and Counterclaim of defendant J. Potter Whittren, Answer of defendant Frank H. Waskey to Second Amended Complaint, Answer of defendant Andrew Eadie to Second Amended Complaint, Order Overruling Demurrer, Reply to Separate Answer of defendant J. Potter Whittren, Reply to Separate Answer of defendant Frank H. Waskey, Reply to Answer of J. Potter Whittren to Plaintiff's Second Amended Complaint, Amended Answer of defendant Andrew Eadie to Plaintiff's Second Amended Complaint, Amended Answer of defendant J. Potter Whittren to Plaintiff's Second Amended Complaint, Reply to Amended Answer of defendant J. Potter Whittren to Plaintiff's Second Amended Complaint, Reply to Amended Answer of defendant Andrew Eadie to Plaintiff's Second Amended Complaint, Verdict, Motion for New Trial, Order Overruling Motion for New Trial, Judgment, Bill of Exceptions, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Bond on Writ of Error, Lodged Copy Writ of Error, and Præcipe for Transcript on Writ of Error, in the case of J. J. Chambers, Plaintiff, vs. Andrew Eadie, et al., Defendants, No. 1629 this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the Original Writ of Error and Original Citation in the above-entitled case are attached to this transcript.

Cost of transcript, \$162.55; paid by Albert Fink, of attorneys for defendants.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 3d day of February, A. D. 1908.

[SEAL.]

JNO. H. DUNN, Clerk.

609

[*Writ of Error (Original).*]

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

Writ of Error.

UNITED STATES OF AMERICA,

District of Alaska, ss:

The President of the United States of America to the Honorable the Judge of the United States District Court for the District of Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between J. J. Chambers, plaintiff, and Andrew Eadie, J. Potter Whittren and F. H. Waskey, defendants, a manifest error hath happened to the great damage of the said Andrew Eadie, J. Potter Whittren and F. H. Waskey, plaintiff in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties
610 aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, and all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, in the City and County of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said Circuit on the 17th day of January, 1908, and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of December, 1907.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the clerk's office, at Nome, Alaska, this 19th day of December, 1907.

[SEAL.]

JNO. H. DUNN,
*Clerk of the United States District Court for
the District of Alaska, Second Division.*

Allowed this 19th day of December, 1907.

ALFRED S. MOORE,
Judge of the United States District Court for
the District of Alaska, Second Division.

[Endorsed:] No. 1629. In the District Court for the District of
Alaska, Second Division. J. J. Chambers, Plaintiff, vs. An-
drew Eadie, J. Potter Whittren and F. H. Waskey, Defend-
ants. Writ of Error.

[Citation on Writ of Error (Original).]

In the United States District Court for the District of Alaska, Second
Division.

J. J. CHAMBERS, Plaintiff,
vs.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

Citation.

UNITED STATES OF AMERICA,
District of Alaska, ss:

The President of the United States of America to J. J. Chambers,
Greeting:

You are hereby cited and admonished to be and appear at the
United States Circuit Court of Appeals for the Ninth Circuit, to be
holden at the City and County of San Francisco, in the State of
California, on the 17th day of January, 1908, pursuant to a writ of
error filed in the Clerk's Office of the United States District Court
for the District of Alaska, Second Division, wherein Andrew Eadie,
J. Potter Whittren and F. H. Waskey, are plaintiffs in error, and
you are defendant in error, to show cause, if any there be, why judg-
ment in the said writ of error mentioned should not be cor-
rected, and speedy justice should not be done to the parties
in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the
Supreme Court of the United States of America, this 19th day of
December, A. D. 1907, and of the Independence of the United States
the one hundred and thirty-first.

[SEAL.]

ALFRED S. MOORE,
Judge of the United States District Court,
Second Division, District of Alaska.

Attest:

JNO. H. DUNN, Clerk.

Personal service of the foregoing citation made on me, and the
receipt of a copy thereof admitted this 19th day of December, 1907.

WILLIAM A. GILMORE,
Of Attorneys for Defendant in Error.

[Endorsed:] No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren and F. H. Waskey, Defendants. Citation.

[Endorsed:] No. 1595. United States Circuit Court of Appeals for the Ninth Circuit. Andrew Eadie, J. Potter Whittren and F. H. Waskey, Plaintiffs in Error, vs. J. J. Chambers, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Second Division. Filed April 16, 1908. F. D. Monckton, Clerk.

613 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1595.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six hundred and twelve (612) pages, numbered from and including one (1) to and including six hundred and twelve (612), comprised in the preceding two (2) volumes, marked, respectively, Vol. I and Vol. II, to be a true copy of the printed Transcript of Record upon Writ of Error to the United States District Court for the District of Alaska, Second Division, in the above-entitled case, as the original and copies of the said printed Transcript of Record were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this twentieth day of December, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

[]

F. D. MONCKTON, *Clerk.*

614 United States Circuit Court of Appeals for the Ninth Circuit.
No. 1595.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

Addenda.

Proceedings had in the United States Circuit Court of Appeals for
the Ninth Circuit.

615 At a stated term, to wit, the October term, A. D. 1908, of the
United States Circuit Court of Appeals for the Ninth Cir-
cuit, held at the courtroom, in the City and County of San Fran-
cisco, on Monday, the nineteenth day of October, in the year of
our Lord one thousand nine hundred and eight.

Present: The Honorable William B. Gilbert, Circuit Judge; Hon-
orable Erskine M. Ross, Circuit Judge; Honorable William W. Mor-
row, Circuit Judge.

No. 1595.

ANDREW EADIE et al., Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. William H. Metson,
counsel for the plaintiffs in error, and Mr. C. D. Murane, counsel for
the defendant in error, and submitted to the court for consideration
and decision, with leave to counsel for the plaintiffs in error to file
a printed argument and reply brief.

616 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1595.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

Ira D. Orton, Albert Fink, F. E. Fuller, O. D. Cochran, Campbell, Metson, Drew, Oatman & MacKenzie, and E. H. Ryan, for the Plaintiffs in Error.

C. D. Murane, William A. Gillmore and Albert H. Eliot, for the Defendant in Error.

Before Gilbert, Ross and Morrow, Circuit Judges.

Opinion U. S. Circuit Court of Appeals.

The defendant in error brought ejectment against the plaintiffs in error to recover the possession of a one-half interest in the Bon Voyage mining location, in the Cape Nome Recording District in Alaska, and to recover damages for the wrongful detention thereof. To prove his title, the defendant in error introduced in evidence a deed to him from Whittren, the original locator of the claim. The deed

617 was dated April 21, 1902, and upon its face purported to convey an undivided one-half interest in the Bon Voyage and certain other mining claims. There was but one witness to its execution, and he was the notary public before whom it was acknowledged. An indorsement on the deed indicated that it had been recorded in the records of Deeds of the Nome District about four years after its execution. It was conceded that the deed on its face appeared to have been altered in a material part, to wit, in the interest conveyed. The defendant in error testified that on May 23 or 24, 1906, Whittren, the grantor, had, with his consent and in his presence, changed the deed from a conveyance of a three-fourths interest to a conveyance of a one-half interest. Whittren, on the other hand, testified that the alteration was not made at the time so stated by the defendant in error, but at a date prior thereto, and that it was made by the defendant in error, who confessed to him that he had altered the description from a one-fourth interest to a one-half interest. The plaintiffs in error objected to the introduction of the deed in its altered condition, but the objection was overruled. It was proven that on September 24, 1905, the plaintiff in error, Whittren, made to the plaintiff in error, Eadie, a deed of an undivided one-half interest in the claim and that the deed was properly witnessed, acknowledged and recorded a year prior to the recording of the deed to the defendant in error. The consideration for the deed to Eadie was the promise of the grantee to do the assessment work on the

claim for the year 1904. It was further shown that on June 11, 1906,

618 Whittren and Eadie made a lease to the plaintiff in error of the westerly 220 feet of the claim for a term of two years, and that the lease had been filed for record on August 22, 1906; that Waskey entered into the possession under said lease and began to prospect and mine the leased property; that thereafter on June 20, 1906, Whittren leased to Eadie and Waskey the remainder of the claim for a period of two years and that the lease thereof was recorded on August 30, 1906; that Waskey and Eadie entered into possession under said last-named lease, and began to prospect the leased property for gold, and were in the active prosecution of development and operation when the action of ejectment was commenced. The case was submitted to a jury, and a verdict was returned in favor of the defendant in error, finding that he was the owner of an undivided one-half interest in the Bon Voyage claim, and entitled to damages against the plaintiffs in error in the sum of \$20,483.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the Court.

The principal question in the case is whether the deed from Whittren to the defendant in error, attested as it was by but one witness, was sufficient to convey the title as between the parties thereto. At common law, a deed is valid between parties and their privies, if signed, sealed and delivered, and attestation is no part of its execution. 2 Blackstone Com. 307; Dole vs. Thurlow, 12 Met. 164; Hepburn vs. Dubois, 12 Pet. 345. In adopting systems of registration of conveyances, about one-half of the states have enacted statutes requiring that the execution of deeds be attested by witnesses, who shall subscribe their names thereto as such. It is the decided weight of authority that the purpose of such a statute is to entitle the conveyance to be recorded, and that while compliance therewith is essential to registration, a failure to comply does not affect the common-law rule that a deed signed, sealed and delivered is good as between the parties. The statute of Alaska, which was adopted from the statutes of Oregon, is not essentially different from that which is in force in the states herein-after referred to. Section 73, chap. 11 of the Civil Code of Alaska provides: "A conveyance of lands or of any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as directed in this chapter, without any other act or ceremony whatever." Section 82 provides: "Deeds executed within the district, of lands or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such." Section 113 is a curative statute, also adopted from the statutes of Oregon. It provides: "All deeds to real property heretofore executed in the district which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the

grantees, without any other execution or acknowledgment whatever, and such deeds so executed shall be received in evidence in all courts in the district, and be evidence of the title to the lands therein described against the grantors, their heirs and assigns." If it be argued from the language of this curative statute, that it was the understanding of the law-makers that an unattested deed was insufficient to pass title between the parties without the aid of a curative statute, the answer is that the defects intended to be cured by the statute are other and more vital than the mere omission of attesting witnesses. It was the intention to make valid as between the parties unsealed deeds, deeds which lacked one of the essential requisites of a common-law conveyance even as between the parties.

In adopting the Oregon Statute for Alaska, there was adopted with it the construction placed upon it in *Moore vs. Thomas*, 1 Or. 24, in which the Court held that an unacknowledged, unrecorded mortgage was good between the parties thereto, for the principle involved is the same whether a deed lack acknowledgment or subscribing witnesses. The Court, by Williams, Chief Justice, said: "When said mortgages were signed, sealed and delivered by Thomas to Moore, they were certainly good at common law, and there is no reason to suppose that the design of the registry Act was to prevent the operation of a deed so made or to protect the parties thereto as against each other; but the manifest and exclusive object of such act was to protect third persons from fraud or injury by means of prior secret conveyances." In *Goodenough vs. Warren*, 5 Saw. 494, Judge Deady, after referring to the fact that at common law a deed is valid between the parties though not witnessed, acknowledged, or recorded, inquired: "Does the statute of Oregon change this rule? Section 1 of the act relating to conveyances (Or. Laws 515) declares that 'conveyances of land or of any estate or interest therein may be made by deed signed and sealed,' and although in the same section and sentence it is further provided that such deeds may be 'acknowledged or proved and recorded' as therein directed, yet it is not declared, and evidently was not intended to make either such acknowledgment, proof or record any part of the execution of such instrument. * * * But Section 10 of the act aforesaid does not declare that 'deeds executed within this state of lands or any interest in lands therein, shall be executed in the presence of two witnesses who shall subscribe their names to the same as such,' and while this provision may not make such attestation an essential part of the execution of the deed, yet it is probable that where the execution is controverted, it cannot be shown if not so attested. It is not a part of the execution, but the means by which it must be proven, if necessary." In *Brewster on Conveyances*, section 251, it is said: "Generally speaking, in those states where statutes provide that conveyances shall be attested by witnesses, the requirement is not essential to the validity of the deed as between the parties, but, like the requirement as to acknowledgment, is a formality necessary under the statute to entitle the deed to be recorded."

In Wisconsin, in *Leinenkugel vs. Kehl*, 73 Wis. 238, the Court reviewed its prior decisions, holding that attestation and acknowledgment of deeds required by the statute were but formalities to entitle the deed to be recorded, so as to operate as notice to subsequent purchasers, but were not essential to the transfer of the title as between the parties. That doctrine, the Court said, was "in accord with the great weight of authority upon this subject." In *Pearson vs. Davis*, 59 N. W. 885, the Supreme Court of Nebraska, following a line of its prior decisions, held that a deed to real estate executed, acknowledged and delivered by the grantor is valid between the parties to it, although the same is not witnessed. In *Howard vs. Russell*, 104 Ga. 230, the Court said: "While the Code of this state requires such paper to be attested by two witnesses, it does not declare that a deed attested by but one witness is void. The main object of the attestation by two witnesses is to comply with the registration laws of the state." Of similar import are *Lane vs. Canales* (Texas), 25 S. W. 29; *Robinson vs. Gray et al.* (Ky.), 97 S. W. 347; *Fitzhugh v. Crogan*, 2 J. J. Marsh. 429; *Stone vs. Ashley*, 13 N. H. 38; *Hastings vs. Cutler*, 24 N. H. 481.

As opposed to this construction we are referred to decisions in Connecticut, Ohio, Alabama, Michigan and Minnesota. The Michigan case which is cited is *Crane vs. Reader*, 21 Mich. 24. In that case, in determining the validity under the territorial law of 1820, of an unattested deed made in 1823, the Court held that the ordinance of 1787 requiring the attestation of two witnesses, which was in substance re-enacted in 1820, was intended to supplant the common law of the territory of Michigan, and that since the law in force in that territory prior to the ordinance was the French

law, under which deeds were required to be attested by witnesses, a deed without witnesses was void, but in *Dougherty vs. Randall*, 3 Mich. 581, the Court held that the statute of Michigan of 1840 requiring two subscribing witnesses to a deed of real estate was a provision for registration only, and that by the common law title passes by an unwitnessed deed. Such has been the ruling of that court ever since. *Price vs. Haynes*, 37 Mich. 487; *Baker v. Clark*, 52 Mich. 22; *Fulton vs. Priddy*, 123 Mich. 298; *Carpenter vs. Carpenter*, 126 Mich. 217. The Minnesota case which is cited is *Meighen vs. Strong*, 6 Minn. 177, in which it was held that a statute which requires that a conveyance shall be executed in the presence of witnesses who shall subscribe their names thereto as such is imperative, and must be complied with to give the instrument any validity as a conveyance. But under the statute of Minnesota as amended in 1868, which provided: "Deeds of land or any interest in lands within this state shall be executed in the presence of two witnesses who shall subscribe their names to the same as such," the Court held in *Morton vs. Leland*, 27 Minn. 35, that to pass title from the grantor to the grantee, nothing more was necessary than the execution and delivery of the deed, and that neither witnesses nor acknowledgment were requisite. The same was held in *Johnson vs. Sandhoff*, 30 Minn. 197, and in *Conlon vs. Grace*, 36 Minn. 276.

In the light of the authorities and especially the construction given by the Oregon courts to the Oregon statute before its adoption for Alaska, we find no error in the ruling of the trial
624 court that the deed was sufficient to convey title from Whittren to the defendant in error.

Error is assigned to the instruction of the Court to the jury on the subject of alteration of the deed. The Court in substance instructed the jury that if they found that the deed was altered or changed by the consent of the parties or by the grantor Whittren, or that the change was made with Whittren's consent, and that the alteration was made by reducing the amount of property conveyed, the deed was a good and valid conveyance, if re-delivered, of an undivided one-half interest in the property. That the Court in so instructing the jury correctly stated the law of the case is too clear to require discussion. If a three-fourths interests was vested in the grantee by the deed as originally made, the alteration could at the utmost operate no further than to divest him of an undivided one-fourth interest.

Error is assigned to the instruction to the jury concerning the rights of the lessees Waskey and Eadie under their leases from Whittren as against the title of the defendant in error. The Court charged the jury that a lease for a term of years of a mining claim is personal property under the Alaska Code and not a conveyance of land or real property such as to raise the question of priority of record between a deed and a lease, and that under the law the question of innocent purchaser does not raise in the case. The action had been begun on October 8, 1906. The plaintiff in error Waskey answered the complaint, setting forth the lease of June 11, 1906,
and the lease of June 20, 1906, whereby the lessees were
625 given authority to operate the mine at their own expense

upon the payment of a royalty to the lessors; that possession was taken under said leases in good faith, for a valuable consideration, without knowledge or notice of the interest of the defendant in error in said claim, and that the lessees operated the leased property for a long period of time in good faith and at great expense without knowledge or notice of said interest of the defendant in error. The leases were for a term of two years. The amount of money expended thereunder by the lessees is not set forth in the answer. The Code of Alaska, chap. 11, sec. 98, provides: "Every conveyance of real property within the district hereinafter made, which shall not be filed for record as provided in this chapter, shall be void against any subsequent innocent purchaser, in good faith and for a valuable consideration, of the same real property or any portion thereof, whose conveyance shall be first duly recorded." There are two reasons why Waskey and Eadie cannot avail themselves of the defense of innocent purchaser. In the first place, their leases for a term of two years were not conveyances. In several of the states, the term "conveyance" is defined by statute, but there is no such definition in the laws of Alaska or in those of Oregon from which they were taken. At common law a conveyance is an instrument in writing by which property or the title to property is con-

veyed or transmitted from one person to another: 9 Cyc. 860; Prouty vs. Clark et al., 73 Ia. 55; Brigham vs. Kenyon, 76 Fed. 30.

626 Sec. 181, chap. 18 of the Code of Alaska declares that real property "includes all lands, tenements and hereditaments and rights thereto, and all interests therein, whether in fee simple or for the life of another." In construing the Oregon statute from which this was taken, the Supreme Court of Oregon in Edwards vs. Parker, 7 Or. 149, held a lease of land for a term of years to be a chattel interest and not an interest in the land. The Court said: "The statute provides for the conveyance of land by deed, and we think embraces only such conveyances as purport to convey a freehold estate, such as may descend to the heirs, or is for the life of the grantee, and does not include leases." In the second place, the lessees were not purchasers for a valuable consideration. By the terms of their leases, they were to operate the mine, and out of the proceeds pay a royalty to the lessor. It is true that they expended money in developing and in operating the leased property, but the evidence shows that they have been reimbursed by the product of the mine.

We find no error for which the judgment should be reversed. It is therefore affirmed.

[Endorsed:] No. 1595. United States Circuit Court of Appeals for the Ninth Circuit. Opinion. Filed Jul. 6, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

627 In the United States Circuit Court of Appeals for the Ninth Circuit.

ANDREW EADIE, J. POTTER WHITTREN, AND F. H. WASKEY, Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

Dissenting Opinion U. S. Circuit Court of Appeals.

Ross, *Circuit Judge*, dissenting:

I dissent.

Section 301 of chapter 32 of the Alaska Codes, prescribing who may bring actions to recover the possession of real property, is as follows:

"SEC. 301. Any person who has a legal estate in real property and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of any one, then against the person acting as the owner thereof." (31 Stats. L. 383.)

The present being an action at law to recover the possession of real property, with damages for its withholding, it was essential to its maintenance for the plaintiff to establish in himself a
628 legal estate in the property sued for, and a right to its possession; and so the court below in effect instructed the jury.

The plaintiff attempted to do that by means of the deed from Whittren to him. The primary objection made by the defendants to that deed was that it was only witnessed by one person. The validity of the deed in that respect is, of course, to be tested by the provisions of the Alaska statute. Sections 73 and 82 of the Civil Code enacted by Congress June 6, 1900, for that District, are as follows:

"SEC. 73. A conveyance of lands, or of any estate or interest therein, may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged, or proved, and recorded as directed in this chapter, without any other act or ceremony whatever."

"SEC. 82. Deeds executed within the District of lands or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such; and the persons executing such deeds may acknowledge the execution thereof before any Judge, Clerk of the District Court, Notary Public, or Commissioner within the District, and the officer taking such acknowledgment shall endorse thereon a certificate of the acknowledgment thereof, and the true date of making the same, under his hand."

It is contended on behalf of the defendant in error that "The attesting witnesses and acknowledgment are no part of the deed, but are the means by which it is prepared for record, so that
629 it may constitute constructive notice"; and such seems to have been the view of the trial court.

The provisions of the Act of June 6, 1900, in respect to the acknowledgment, proof, and recording of deeds, are as follows:

"SEC. 88. No acknowledgment of any conveyance having been executed shall be taken by any officer unless he shall know, or have satisfactory evidence that the person making such acknowledgment is the individual described in and who executed such conveyance."

"SEC. 89. Proof of the execution of any conveyance may be made before any officer authorized to take acknowledgment of deeds, and shall be made by a subscribing witness thereto, who shall state his own place of residence, and that he knew the person described in and who executed such conveyance, and such proof shall not be taken unless the officer is personally acquainted with such subscribing witness or has satisfactory evidence that he is the same person who was a subscribing witness to such instrument."

"SEC. 90. When any grantor is dead, out of the District, or refuses to acknowledge his deed, and all the subscribing witnesses to such deed shall also be dead or reside out of the District, the same may be proved before the District Court or any Judge thereof, by

proving the handwriting of the grantor and of any subscribing witness thereto."

"SEC. 91. Upon the application of any grantee or of any person claiming under him, verified by the oath of the applicant
630 setting forth that the grantor is dead, out of the District, or refused to acknowledge his deed, and that any witness to such conveyance refuses to appear and testify touching the execution thereof, and that such conveyance cannot be proven without his evidence, any officer authorized to take the acknowledgment or proof of conveyance, except a commissioner of deeds, may issue a subpoena requiring such witness to appear and testify before such officer touching the execution of such conveyance."

"SEC. 93. Every officer who shall take the proof of any conveyance shall endorse his certificate thereon, signed by himself on the conveyance, and in such certificate shall set forth the things hereinbefore required to be done, known or proved, together with the names of the witnesses examined before such officer, and their places of residence and the substance of the evidence by them given."

"SEC. 94. Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed by any of the officers before named may be read in evidence without further proof thereof, and shall be entitled to be recorded in the precinct in which the lands lie."

From the foregoing provisions of the statute in relation to the execution, proof, acknowledgment and recording of deeds in the District of Alaska, it is apparent, I think, that the attesting of the two witnesses is an essential part of the execution. Congress thus made provision for the execution of deeds covering lands in Alaska, for their acknowledgment by the grantor before an officer
631 authorized to take such acknowledgments, and for the proof before such an officer of such execution by one or both of the two witnesses it provided should sign all such deeds as attesting witnesses. Perhaps one of the reasons for those provisions lies in the peculiar conditions existing in the extensive region of country with which it was dealing, the roaming character of its people, going into it with a rush in the spring and coming out of it with a rush in the fall, with many practical difficulties while there in the way of making either acknowledgment or proof of such instruments. But whatever the reason, the courts have no power to dispense with the requirement by Congress that such an instrument shall be attested by two witnesses. If so, they have the same power to hold that there may be no attesting witness at all.

A similar case came before the Supreme Court from Ohio, one of the statutes of which state at the time required all deeds of land therein to be executed in the presence of two witnesses, who should subscribe their names thereto. The case is reported in 6 Wheat, 576, under the title of Clark vs. Graham, where the Supreme Court said:

"The deed of Massie was executed in the presence of one witness only, whereas the law of Ohio requires all deeds of land to be executed in the presence of two witnesses. It is perfectly clear that

no title to the lands can be acquired or passed unless according to the laws of the state in which they are situated. The act of Ohio, regulating the conveyance of lands, passed on the 14th of 632 February, 1895, provides "That all deeds for the conveyance of lands, tenements and hereditaments, situated, lying and being within this state, shall be signed and sealed by the grantor in the presence of two witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within this state, shall be acknowledged by the party or parties, or proven by the subscribing witnesses, before a judge of the Court of Common Pleas, or a Justice of the Peace in any county in this state.' Although there are no negative words in this clause declaring all deeds for the conveyance of lands executed in any other manner to be void; yet this must be necessarily inferred from the clause in the absence of all words indicating a different legislative intent, and, in point of fact, such is understood to be the uniform construction of the act in the courts of Ohio. The deed, then, in this case not being executed according to the laws of the state, the evidence was properly rejected by the Circuit Court."

In a recent case brought here from Alaska,—Alaska Exploration Company vs. Northern Mining and Trading Company, 152 Fed. 145—we held that a deed to an interest in a mining claim in Alaska which was neither witnessed by two witnesses nor acknowledged as required by sections 5342, 5350, 5354, 5355 of the Oregon Statutes (B. & C. Com.), made applicable to Alaska by the Act of Congress of May 17, 1884 (23 Stats. 24)), was not entitled to record, and hence that the record thereof was not constructive notice to a subsequent purchaser.

633 That Congress meant what it said when by sec. 82 of the Act of June 6, 1900, above quoted, it required all subsequent deeds to lands in Alaska to be attested by two subscribing witnesses, is, I think, further manifested by sections 108, 111, and 113 of the same act, which are as follows:

"SEC. 108. All conveyances of real property heretofore made and acknowledged, or proved in accordance with the laws of the district in force at the time of such making and acknowledgment of proof, shall have the same force as evidence and be recorded in the same manner and with like effect as conveyances executed and acknowledged in pursuance of the provisions of this chapter."

"SEC. 111. All defective and informal acknowledgments of deeds, powers of attorney, mortgages or other instruments for the conveyance of land or interest therein heretofore made by any person or persons in good faith, whether the acknowledgments were taken by or before any clerk, deputy clerk or judge of any court of record within the district, or any commissioner or notary public of the district, shall be and the same are hereby legalized."

"SEC. 113. All deeds to real property heretofore executed in the district which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees without any other execution or acknowledgment whatever; and such deeds so

634 executed shall be received in evidence in all courts of the district and be evidence of the title to the lands therein described against the grantors, their heirs and assigns."

These are remedial sections, and the very fact that Congress thereby provided that all deeds theretofore made and acknowledged or proved in accordance with the laws of the District of Alaska in force at the time of such making and acknowledgment or proof, should be received in evidence notwithstanding the provisions of the Act of June 6, 1900, and that all deeds to real property theretofore made in Alaska by the mere signing by the grantor, without any other execution, should be deemed sufficient in law to convey the legal title to the premises therein described from the grantor to the grantee, and be received in evidence notwithstanding the provisions of the act of June 6, 1900, makes the conclusion quite irresistible, in my opinion, that its intention was that in respect to deeds executed after the passage of that act, those only which conformed to its provisions should be held to be valid conveyances of the legal title to the premises therein described, or receivable as evidence of such title.

[Endorsed:] No. 1595. United States Circuit Court of Appeals, for the Ninth Circuit. Dissenting Opinion. Filed Jul. 6, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

635 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1595.

ANDREW EADIE, J. POTTER WHITTREN and F. H. WASKEY, Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

In Error in the District Court of the United States for the District of Alaska, Second Division.

Judgment U. S. Circuit Court of Appeals.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Alaska, Second Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs in favor of the defendant in error; and that the defendant in error J. J. Chambers recover against the plaintiffs in error Andrew Eadie, J. Potter Whittren and F. H. Waskey, for his costs herein expended, and have execution therefor.

[Endorsed:] Judgment. Filed and entered July 6, 1909. F. D. Monckton, Clerk.

636 [Certificate of Clerk U. S. District Court Relative to Omission from Record, and for Correction of Record, etc.]

In the District Court for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS, Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Defendants.

I, John H. Dunn, Clerk of the above-entitled Court, do hereby certify that on the 1st day of August, A. D. 1907, and before the date of the trial of the above-entitled cause in this Court, upon the written motion of plaintiff Chambers, this Court entered the following order:

"#1629.

CHAMBERS

vs.

EADIE et al.

(Minute Order.)

The Court rendered a decision granting plaintiff's motion to strike from defendant Whittren's amended answer to second amended complaint all of paragraph 4, the same decision to apply to motion to strike from defendant Eadie's amended answer to second amended complaint."

And I hereby further certify that the above-mentioned minute order was inadvertently omitted from the transcript of the
637 record as prepared and sent up from this Court to the Circuit Court of Appeals for the Ninth Circuit.

This certificate is made upon request of W. A. Gilmore, attorney for plaintiff Chambers, in order to correct the record and to inform said Circuit Court of the status of the pleadings in the said cause at the time of the trial.

Witness my hand and the seal of this Court this 30th day of August, A. D. 1909.

[SEAL.]

JNO. H. DUNN.

[Endorsed]: Original. No. 1595. United States Circuit Court of Appeals for the Ninth Circuit. Andrew Eadie et al. vs. J. J. Chambers. Certificate of Clerk U. S. District Court Relative to Omission from Record, and for Correction of Record, etc. Filed Sep. 13, 1909. F. D. Monckton, Clerk.

At a Stated Term, to wit, the October Term, A. D. 1909, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court-room, in the City and County of San Francisco, on Monday, the fourth day of October, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable William H. Hunt, District Judge.

638

No. 1595.

ANDREW EADIE et al., Plaintiffs, in Errors

vs.

J. J. CHAMBERS, Defendant in Error.

Order Denying Petition for a Rehearing.

It is ordered that the petition for a rehearing heretofore filed in the above-entitled cause be, and hereby is denied.

639 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1595.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Plaintiffs in Error.

vs.

J. J. CHAMBERS, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twenty-six (26) pages, numbering from and including one (1) to and including twenty-six (26), to be a true copy of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this twentieth day of December, A. D. 1909.

[SEAL.]

F. D. MONCKTON, *Clerk.*

640 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Andrew Eadie, J. Potter Whittren and F. H. Waskey are plaintiffs in error, and J. J. Chambers is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Alaska, Second Division, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of April, in the year of our Lord one thousand nine hundred and ten.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

642 [Endorsed:] File No. 22,052. Supreme Court of the United States. No. 826, October Term, 1909. Frank H. Waskey, Petitioner, vs. J. J. Chambers. No. 1595. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Certiorari. Filed Apr. 12, 1910. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

643 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1595.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

Stipulation.

It is hereby stipulated by and between the counsel for the Plaintiffs in Error and the counsel for the defendant in Error in the above-entitled action that the certified transcript of the record used on the application to the Supreme Court of the United States for a Writ of Certiorari in the case entitled therein "Frank H. Waskey,

Petitioner, vs. J. J. Chambers, respondent," and now on file in said Supreme Court may be deemed the certified transcript of record on return to the writ of certiorari issued out of the said Supreme Court in the case; and that the clerk of the United States Circuit Court of Appeals for the Ninth Circuit in making his return to the said writ may attach thereto a certified copy of this stipulation in lieu of another certified transcript of the record.

(Signed) CAMPBELL, METSON, DREW, OAT-
MAN & MACKENZIE, AND
E. H. RYAN,

Attorneys for Plaintiffs in Error.

C. D. MURANE, WILLIAM A. GIL-
MORE, AND ALBERT H. ELLIOT,

Attorneys for Defendant in Error.

Dated May 6th, 1910.

644 (Endorsed:) Original. No. 1595. In the United States Circuit Court of Appeals for the Ninth Circuit. Andrew Eadie et al., Plaintiffs in Error, vs. J. J. Chambers, Defendant in Error. Stipulation Re Return to Writ of Certiorari from Supreme Court U. S. Filed May 9, 1910, F. D. Monckton, Clerk.

645 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1595.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation Re
Return to Writ of Certiorari from Supreme Court U. S.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit do hereby certify the next preceding two pages, numbered from and including one (1) to and including two (2), to be a full, true, and correct copy of a "Stipulation Re Return to Writ of Certiorari from Supreme Court U. S.," filed in the above-entitled cause on the 9th day of May, A. D. 1910, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this tenth day of May, A. D. 1910.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

646 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1595.

ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY,
Plaintiffs in Error,

vs.

J. J. CHAMBERS, Defendant in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed writ of Certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ a certified copy of the stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and, pursuant thereto, do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this tenth day of May, A. D. 1910.

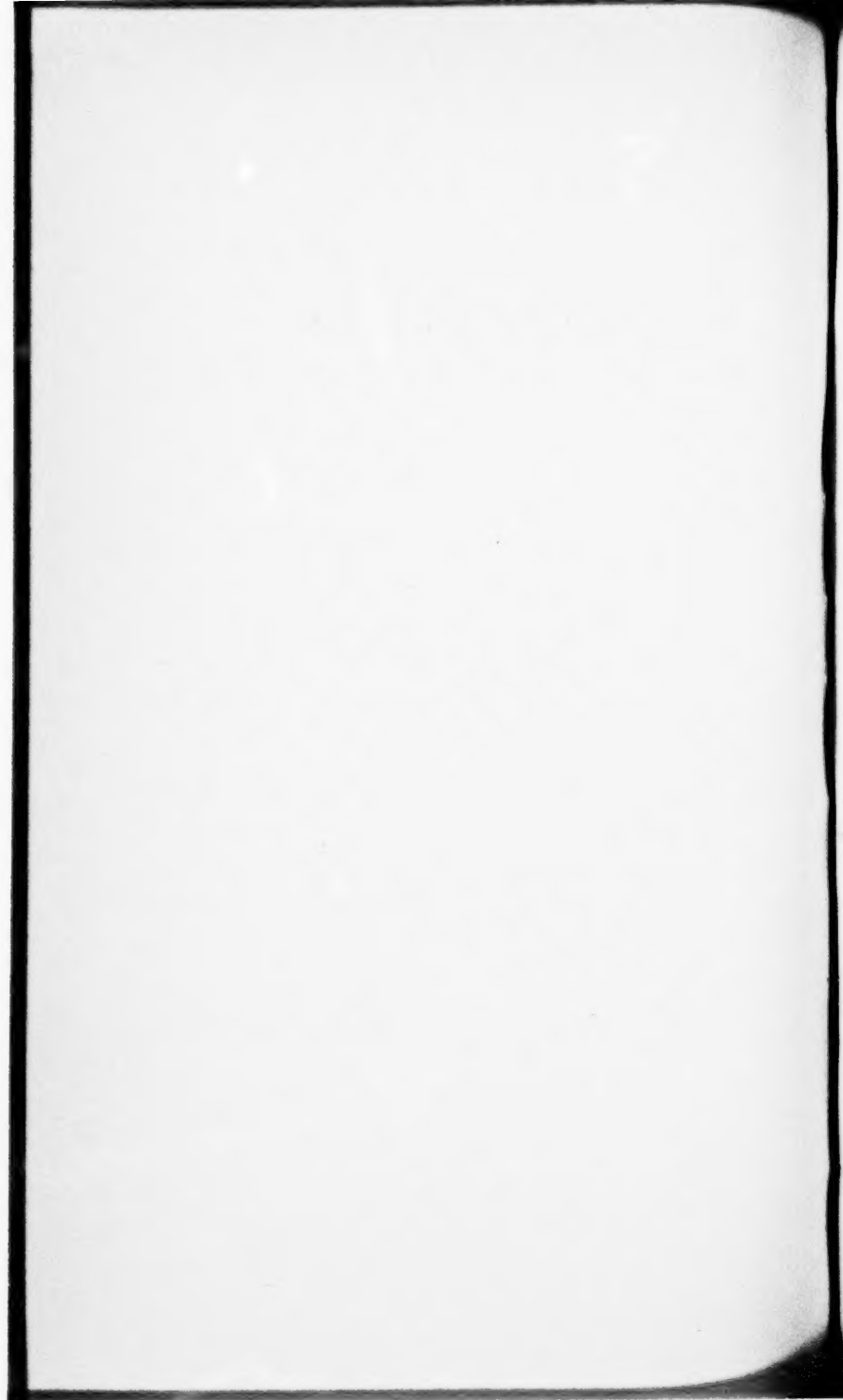
[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.*

[Endorsed:] 826/22052.

647 [Endorsed:] File No. 22,052. Supreme Court U. S.
October Term, 1909. Term No. 826. Frank H. Waskey
vs. J. J. Chambers. Writ of Certiorari and return. Filed May
17th, 1910.



SUMMARY.

This is a case wherein a Writ of Certiorari issues—i. e., the “necessity of avoiding conflict between two or more Courts of Appeal or between Courts of Appeal and the Courts of a State” (Forsythe vs. Hammond, 166 U. S., 514), and in order to secure that uniformity which must characterize the decisions of the Federal Appellate Courts (Am. Const. Co. vs. Jacksonville R. Co., 148 U. S., 372). A direct conflict is shown herein between the Circuit Court of Appeals and the Supreme Court of the United States and between the Circuit Court of Appeals and the Courts of last resort of nine States.

Furthermore, the question involved is of the greatest moment to Alaska, in that it affects the titles to vast areas of fabulous value now being operated under the provisions of the Alaska statute, the existence of which provisions was entirely ignored by the Court of Appeals in deciding the case, although argued to them.

The Supreme Court of the United States has already granted certiorari in one branch of this case (Waskey vs. Hammer).

The facts are these:

In January, 1902, one Whittren located the “Bon Voyage” claim in Alaska. In April, 1902, he attempted to deed an interest therein to Chambers. This deed had only one witness. The Alaska Code required two. And was

not recorded until July 20, 1906. In August, 1902, Chambers left Alaska, not returning for four years. He made no provision for development nor for the maintenance of title by annual work during this time.

Whittren stayed in Nome. The record title stood in his name. In 1903 he surveyed the claim and did the annual work. In 1904 he conveyed a half interest to one Eadie in consideration of the latter doing the annual work for that year. In 1905 he and Eadie did the annual work.

In 1905 Whittren went to Seattle, where in May, 1906, Chambers produced his 1902 deed showing an apparent conveyance of a half interest to him. Whittren claimed the deed had theretofore been altered by raising the interest from a quarter to a half; that Chambers admitted this fact, whereupon Whittren overlooked it by reason of their family friendship and the making of a written declaration by Chambers that Whittren owned a quarter interest. The alteration is admitted, but Chambers claimed it was done in 1906, when Whittren changed it with consent of Chambers from a three-quarters, which the deed recited, to a one-half, as otherwise Whittren would have conveyed more than he owned to Eadie. The making of this written declaration is admitted. Whittren and Chambers then discussed leasing the ground on a basis of a 25 per cent royalty, Whittren with full power to close. The mine then had no known value. Whittren returned to Alaska in June. Chambers stayed in Seattle.

On June 11, Whittren and Eadie leased your petitioner a portion of the ground, reserving a royalty of 35 per cent, 10 per cent more than Chambers had suggested.

On June 20, Whittren and Eadie entered into a contract with your petitioner relative to the rest of the ground. Petitioner was to prospect at his own expense for pay dirt, and finding it, was to work it until it was completely mined out. The record showed that from 1902 to 1904 Whittren was sole owner, and from 1904 he and Eadie were sole owners. Petitioner had no notice or means of notice of Chambers' unrecorded 1902 deed.

Petitioner expended thousands of dollars in moving an outfit on ground and sinking two shafts 80 feet to bed-rock, where he discovered rich pay.

Then Chambers went to Alaska and, recording his altered, imperfectly witnessed, unacknowledged deed, brought ejectment against Eadie, Whittren and your petitioner for a half interest in the "Bon Voyage." All defendants answered, and Whittren alleged that the deed was invalid, and pleaded an estoppel against Chambers claiming more than one-fourth because of the written declaration made in Seattle. Chambers replied denying the invalidity set up in the answer, but admitting by failure to deny the estoppel under the declaration as to the quarter interest.

On the trial before a jury, the Court—

1. Admitted over objection, the unwitnessed altered deed from Whittren to Chambers.

2. Instructed that the Chambers writing that he and Whittren were quarter owners should be disregarded, this although such declaration was admitted by the pleadings;

and directed the jury if they found for Chambers to find for a half interest.

3. Instructed as to your petitioner being an innocent purchaser for value without notice, that a lease was not within the purview of the statute.

4. Refused permission to prove by Chambers that he allowed apparent title to remain in Whittren under agreement that Whittren was to have exclusive management and right to lease.

Verdict and judgment for Chambers for one-half interest.

On error to Court of Appeals the judgment was sustained by a divided court, Judge Ross dissenting. That Court decided:

(1) That although Congress had provided in terms that deeds in Alaska should be executed in the presence of two subscribing witnesses, it was not necessary to comply with that provision, in direct conflict with the decision of this Court in Clark vs. Graham, 6 Wheaton, 577, and in conflict with those of the Courts of last resort of nine States construing similar statutes.

(2) That your petitioner was not an innocent purchaser nor entitled to the protection of the Alaskan Code relative to innocent purchasers for value, because—

(A) A lease for years was only personal property, notwithstanding the Alaskan Code provides that a lease is a conveyance of an interest in lands.

(B) Under the contract petitioner was to operate the ground and pay a royalty and had been reimbursed out of the mine for his expenditures thereon.

(3) Failed to pass upon the action of the lower Court—

(A) Denying defendants' rights under the declaration made by Chambers of the quarter interest in Whittren, which had been pleaded as an estoppel and stood undenied.

(B) Ruling out the offer to prove by Chambers that he had left the apparent title in Whittren with agreement that Whittren should have exclusive management of and right to lease ground, although pointed out in briefs and oral argument.

The principal questions presented herein are:

(1) May the Court of Appeals nullify the section of the Alaskan Code providing that deeds shall be executed in the presence of two subscribing witnesses, by holding compliance therewith unnecessary to a valid deed, and this in opposition to the decision of the Supreme Court of the United States construing a similar statute?

(2) May the Court of Appeals nullify the sections of the Alaskan Code providing that a lease exceeding one year is a conveyance of an interest in lands, subject to the provisions protecting innocent purchasers for value without notice, by holding such lease personal property and not within such protection?

(3) May the Court of Appeals nullify the provisions of the Alaskan Code abolishing all distinctions between ac-

tions at law and in equity by ignoring a defense of equitable estoppel admitted by the pleadings to be true?

(4) May the Court of Appeals nullify the statute of Alaska providing that the defendant may set forth as many defenses and counter-claims as he may have, without regard to their being legal or equitable?

(5) May the Court of Appeals ignore the settled law as laid down by the Supreme Court of the United States, that in an action of ejectment, the defense of equitable estoppel is permissible?

In the Supreme Court

OF THE
UNITED STATES

OCTOBER TERM, 1909.

FRANK H. WASKEY,	} <i>Petitioner,</i>
vs.	
J. J. CHAMBERS,	

PETITION OF FRANK H. WASKEY FOR WRIT OF CERTIORARI

REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT TO CERTIFY TO THIS COURT FOR
ITS REVIEW AND DETERMINATION CASE NO. 1595
OF THE DOCKET OF SAID COURT.

*To the Honorable the Chief Justice and the Asso-
ciate Justices of the Supreme Court of the United
States:*

The separate petition of Frank H. Waskey re-
spectfully represents:

Your petitioner realizes that this Honorable Court has already granted one writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review its judgment with reference to the subject matter of this application (*Waskey et al. vs. Hammer et al.*, No. 1609 C. C. A.). And although your petitioner is informed that the power to issue this writ is most sparingly used, yet he is advised and believes that because of the values involved, the conflict of authority on the points hereinafter suggested, the overruling of the Supreme Court of the United States by the Circuit Court of Appeals by a divided Court, and above all, on account of the far-reaching effect of this decision on so large a percentage of the population of Alaska, that the case is one in which this Court will again allow the writ.

The case is one of peculiar hardship, and the questions involved, particularly one, are of such gravity as to render it one of public import.

The facts are these:

January 1, 1902, one Whittren located a placer claim, calling it the "Bon Voyage."

April 21, 1902, Whittren attempted to deed the respondent, Chambers, an interest in this and other claims. Chambers claims the interest was three-fourths, while Whittren insists that it was one-fourth.

This attempted conveyance was subscribed by only one witness. The Alaska statute requires two.

In August, 1902, without making any provision for the care of this property, and without recording this alleged deed, Chambers left Alaska for Seattle, some two thousand miles away. There he resided until the summer of 1906, when he returned to Nome.

Meantime, Whittren remained in Nome. The record title remained in Whittren's name. In 1903 Whittren surveyed and caused the annual work to be done on the claim. In 1904 he deeded a half interest to Andrew Eadie for performing the assessment work for that year.

In 1905 he and Eadie again performed the annual work.

In 1905 Whittren went to Seattle and in May of 1906 he met Chambers there. Chambers then exhibited to Whittren this alleged deed dated 1902.

Whittren claims the deed then showed signs of recent alteration by acids, and that Chambers admitted that he had raised the interest described from one-fourth to one-half. Whittren says he forgave Chambers on account of their former friendship and an intimacy which existed between their wives.

Chambers, on the other hand, claims that he ascertained from Whittren that Whittren had deeded a one-half interest to Eadie, and that in Chambers' presence and with his consent, by the use of chemicals, Whittren changed the alleged deed of April 21, 1902, from three-fourths to one-half, he and Whittren agreeing at the time that they would share

equally in this one-half, so that each should have one-fourth.

Chambers then gave Whittren a writing recognizing Whittren's interest to be one-fourth. The writing was as follows:

"Seattle, Washington.

"May 24, 1906.

"MEMORANDUM.

"This is to certify, that J. Potter Whittren and myself are equally interested in the one-half interest, that is, one-fourth each, in the placer mining claim Bon Voyage, in the Nome Mining District, Alaska, staked January 1, 1902, by J. Potter Whittren. Said Whittren is entitled to a deed for one-fourth interest in said claim on demand.

"J. J. Chambers."

Whittren and Chambers both agreed that the interest sought to be conveyed in 1902 was altered, and this fact was apparent upon the alleged deed.

Chambers and Whittren discussed the leasing of the premises upon a royalty basis of seventy-five per cent to the lessees, reserving twenty-five per cent to themselves. Chambers advocated this, insisting that the lease be given to one Rogers, a personal friend of his. He permitted Whittren to negotiate this matter in his, Whittren's, name.

Whittren returned to Nome in June, 1906, Chambers remaining in Seattle.

At this time the claim was of no known value, and the record showed one-half in Eadie and one-half in Whittren.

June 11, 1906, Whittren and Eadie leased Waskey, your petitioner, the westerly 220 feet of the claim for two years, reserving 35 per cent of the gross output, or 10 per cent more than Chambers had theretofore urged Whittren to lease the premises to Rogers for.

June 20, 1906, Whittren and Eadie, as owners, entered into a contract with Eadie and Waskey as to the balance of the claim, whereby Waskey at his own expense was to prospect for pay dirt, and locating the same was to mine the gold therefrom.

Of the gross gold extracted 25 per cent was to be paid to Whittren and Eadie, and the balance after deducting the expense of mining (but not that of prospecting) was to be equally divided between Waskey and Eadie. This contract was in no sense a lease, and the period of its operation was to be "until the said premises shall have been thoroughly and completely mined and worked out."

At all these times the records of the Nome district wherein the "Bon Voyage" was situated showed that Whittren had been the sole owner of the claim from 1902 until 1904, when he conveyed one-half to Eadie, since which time he and Eadie were the sole owners.

Waskey had no knowledge or means of knowledge of Chambers' alleged claim to the property. Cham-

bers' deed had never been recorded, and Chambers had been absent for four years.

Believing that he had a valid lease and contract, and that he could safely invest his time and capital in the exploitation of the mine, Waskey, at an expense of thousands of dollars, moved a large outfit upon the premises and sank two shafts 80 feet to bedrock.

The title of his grantors and lessors and their right to the possession of the property was attacked by adverse parties, and at a large personal expense Waskey defended it.

As usual in cases of this kind, nothing was done by Chambers until Waskey had discovered a rich pay streak, some 80 odd feet beneath the surface of the earth, through the frozen muck and shale. Though Chambers knew of the lease to Waskey by letter from Whittren, he made no protest to Waskey until long after the latter, by his energy and capital, had demonstrated the values.

Then came Dr. Chambers to Nome with his altered deed, and repudiating even his written memorandum of agreement with Whittren whereby he recognized the latter as owner of a one-fourth interest, filed an action of ejectment against Waskey, Whittren and Eadie, alleging himself the owner of one-half of the premises and entitled to the possession thereof.

Whittren, maintaining that the deed was invalid, answered denying Chambers' title and alleging that

Chambers was estopped from claiming more than one-fourth by reason of the writing above set out.

To this answer Chambers replied, denying the invalidity set up in the answer, but failing to deny, and thereby under the Alaska procedure, admitting the estoppel under the agreement.

Eadie answered denying any information as to Chambers' allegations, and alleging ownership of one-half in himself.

Your petitioner, relying upon Whittren's representations, answered denying Chambers' title, and for a separate defense set up his lease of June 11th and contract of June 20th, alleging himself to be an innocent purchaser in good faith for value and without notice.

Upon the trial of the action with a jury, the Court, over objection, admitted in evidence the alleged deed from Whittren to Chambers, holding that though not good as against an innocent purchaser for value without notice, it was still good as between the parties, and that because Waskey was a mere lessee he could not under any circumstances be an innocent purchaser for value, and therefore the deed was admissible against him!

The trial court ruled that the writing between Chambers and Whittren whereby the former recognized the latter's title to a one-fourth interest, was of no value, and directed the jury to disregard the same,

even though this matter stood *undenied in the pleadings*.

The Court directed the jury, if they found for Chambers, to find for one-half.

As to petitioner's claim that he was an innocent purchaser for value and without notice, the Court directed the jury to disregard such claim, because petitioner being a lessee, could not be an innocent purchaser.

The trial court refused to permit your petitioner to prove that while the apparent title was in Whittren, and that at the time when he, your petitioner, had no knowledge or means of knowledge of any claim of Chambers', he entered into a lease and contract for a valuable consideration without notice and in good faith, and innocently expended large sums in the development of the property.

The trial court even refused to permit your petitioner to prove by Chambers that he had left the apparent title to the premises in Whittren under an agreement between Whittren and himself, that Whittren was to have sole and exclusive charge and management of the premises and was to lease the same,—a clear estoppel.

After this emasculation of the defense by the trial court, the jury brought in a verdict for Chambers for one-half, when, under the very pleadings in the case, the utmost to which he was entitled was one-fourth, with damages accordingly. Upon this ver-

dict judgment was rendered in favor of the respondent Chambers for one-half of the premises and \$20,000 damages.

Upon writ of error the Circuit Court of Appeals refusing to follow the construction of an identical statute by this Honorable Court, held by a divided court (Circuit Judge Ross dissenting) that though the statute expressly demanded a deed be attested by two witnesses, it was sufficient if not so attested.

The Court held that Waskey could not be an innocent purchaser:

1. Because the lease being for years was personal property, and therefore not a conveyance of realty, and so not within the purview of the Alaska Code giving protection to innocent purchasers of real property.

2. Because under the terms of their lease they were to operate and mine, and out of the proceeds pay a royalty to the lessors, and the evidence showed that they had been reimbursed for their expenditures by the product of the mine.

Though raised by the assignments of error, discussed in the briefs, and again pointed out on the oral argument, and set up in the petition for a rehearing, the Circuit Court of Appeals failed to notice or comment upon the action of the trial court in

First: Denying the defendants' right to avail themselves of the writing between Chambers and Whittren recognizing on the part of the former a one-fourth interest in the latter, which said writing had been pleaded in the answer and stood undenied by the reply.

Second: Denying to the defendants below the right to prove by Chambers that he had left the apparent title in Whittren under an agreement between Whittren and himself that Whittren should have the sole and exclusive management of the property and the right to lease the same.

Your petitioner therefore respectfully submits that the said Circuit Court of Appeals erred in this, to wit:

I. In nullifying the statute of Alaska, in view of its express requirement that a deed be attested by two witnesses, and in holding that the alleged deed from Whittren to Chambers, attested by only one witness, passed title from Whittren to Chambers.

II. In not following the settled rule of law as established by this Honorable Court in construing an identical statute, Alaska being entirely within the appellate jurisdiction of the Federal Courts.

III. In holding that a lessee of a mining claim could under no circumstances or conditions whatso-

ever be an innocent purchaser so as to entitle him to protection against an unrecorded, unacknowledged, unattested secret deed.

IV. In refusing to reverse the trial court and remand the case for error, when it appeared that the defendants below had not been permitted to avail themselves of the equitable title to an undivided one-fourth interest in Whittren, which said equitable title was created by the memorandum agreement signed by Chambers, and had been pleaded in the answer and stood undenied by the reply, and

V. In declining to reverse the trial court and remand the case, when it appeared that it had refused to permit your petitioner, defendant below, to prove by Chambers that he had allowed the record title to remain in Whittren under an agreement with Whittren that he, Whittren, should have the sole and complete management of the mine, with the right to lease the same.

I.

As the law stood in Alaska prior to the Act of June 6, 1900, a conveyance of lands or any interest therein might be made by "deed signed and sealed "by the person from whom the estate or interest is "intended to pass," etc.

By the Act of June 6, 1900, embodied in the Civil Code of Alaska, it is provided by Section 1046:

"No estate or interest in real property other than a lease for a term not exceeding one year can be created, transferred or declared otherwise than by operation of law or by conveyance or other instrument in writing subscribed by the party creating or transferring or declaring the same, or by his lawful agent under written authority, and executed with such formalities as are required by law."

Section 73 provides:

"A conveyance of lands or any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as directed in this chapter, without any other act or ceremony whatever."

Section 82 provides:

"Deeds executed within the District of lands or any interest in lands therein shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such."

From this, then, we have the following:

1. Under the old law, the mere signing and sealing was sufficient.
2. Under the new law the instrument to convey the legal title must be in writing and signed by the

grantor and executed with such formalities as are required by statute.

3. It must be by deed, the grantor must be of lawful age, etc.

What formalities are required by law?

"Deeds executed within the District . . . shall be executed in the presence of two witnesses, who shall subscribe their names to the same, as such."

Is it possible that anything could be made more plain than this? On account perhaps of the transient character of the population, the great temptation to frauds and perjuries by reason of the excessive values of the subject-matter, the peculiarly roving temperament of goldseekers, in Nome to-day, Fairbanks next week, South Africa or Australia thereafter, Congress saw fit to change the old law to add thereto certain precautions and formalities not theretofore existing.

If Congress intended the law should remain as before, why the change? Did the change mean nothing?

For a full exposition of the matter your petitioner refers your Honors to the dissenting opinion of Circuit Judge Ross printed in the transcript in this case.¹

¹ Addenda, p. 15.

II.

This Honorable Court has passed upon this matter adversely to the position assumed by the majority of the said Circuit Court of Appeals in a case coming up from Ohio, *Clark vs. Graham*, 6 Wheaton, 577.

Here the deed was attested by one witness, the Ohio statute, like that of Alaska, requiring two.

OHIO STATUTE.

"That all deeds for the conveyance of lands, tenements and hereditaments situate, lying and being within this State shall be signed and sealed by the grantor in the presence of two witnesses, who shall subscribe the said deed or conveyance attesting the acknowledgment of the signing and sealing thereof."

ALASKA STATUTE.

"Deeds executed within the District of lands, or any interest in lands therein shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such."

As can be observed, the two statutes are identical. The cases arose in the same manner. In the action decided by the Supreme Court of the United States, *supra*, the point arose upon the offer of the deed in evidence. It was objected to on the ground that be-

ing attested by only one witness, it was not a conveyance under the laws of Ohio. This Honorable Court said, after quoting the statute, *supra*:

"Although there are no negative words in this clause declaring all deeds for the conveyance of lands executed in any other manner to be void, yet this must be necessarily inferred from the clause in the absence of all words indicating a different legislative intent, and in point of fact, such is understood to be the uniform construction of the act in the courts of Ohio. The deed then in this case not being executed according to the laws of the State, the evidence was properly rejected by the Circuit Court."

It would seem, then, that until changed or modified by this Honorable Court, the Circuit Court of Appeals should be bound by this decision, and especially so in view of the fact that Alaska is one of the Territories of the United States and its District Court is the Supreme Court of the Territory of Alaska.

Steamer Coquitlan vs. United States, 163 U. S., 346.

As was said by this very Circuit Court of Appeals in the case of *Lindeberg vs. Howard*, 146 Fed., 467, in reversing a case sent there from Alaska for the reason that the lower court adopted a rule followed by the State Courts which was opposed to the rule in

the United States Courts, and discussing the District Court for Alaska, say:

"The judgments and decrees can only be reviewed by appeal or writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, or by the Supreme Court of the United States. Our conclusion is that the court below erred in following the rule announced by the State Courts instead of being guided by the decisions of the Supreme Court of the United States."

In any event, there is a conflict of authority between this Court, the Circuit Court of Appeals for the Eighth Circuit, the Supreme Courts of Alabama, Ohio, Arizona, Connecticut, Rhode Island, South Carolina, Georgia, New Hampshire, and Louisiana on the one hand, and the Supreme Courts of Oregon, Wisconsin, Nebraska, Georgia, Texas, Kentucky, New Hampshire, Michigan and Minnesota on the other, the former courts having followed the reasoning adopted by this Honorable Court in *Clark vs. Graham*, and the latter courts having nullified the statute.

And this we respectfully submit brings the case within that class (to avoid conflict of authority) wherein this Court will issue the writ of certiorari.

Again, we respectfully submit that this Court is the final arbiter, nor should any Circuit Court of Appeals be permitted to enforce a different rule

from that so plainly announced by this Court. In other words, the Circuit Court of Appeals, no more than the *nisi prius* court, should be permitted to enforce views contrary to those of this Honorable Court.

Your petitioner is informed that the great latitude given this Court by Section 6 of the Judiciary Act of 1891 was given perhaps for the purpose of enabling this Court to compel the various Circuit Courts of Appeal to adopt and administer its views upon a settled question of law rather than those of each individual Circuit Court of Appeals.

In other words, if this Honorable Court has decided a given point a certain way, then it will review by certiorari any effort upon the part of any of the Circuit Courts of Appeal to decide the same point contrary to the decision of this Honorable Court.

III.

It is, however, in the holding that a lessee can never be an innocent purchaser so as to be protected in his lease against an unwitnessed, unacknowledged, unrecorded deed produced years after its alleged delivery, that the said Circuit Court of Appeals has committed its gravest error, one which, if allowed to stand, will prove an immeasurable hardship to the people of the District of Alaska.

Your petitioner most respectfully represents that the greater portion of the District of Alaska is suit-

able by nature to no other vocation than that of mining. Ninety per cent. of the present population is engaged in this industry and its collateral branches. Seventy-five per cent. of this industry is conducted under the so-called royalty leases or contracts. In fact, there is no other character of leases let save those based upon the production of the mines.

Under and by virtue of the operation of these leasehold estates, the mineral resources of the District have been developed.

To illustrate: A stakes a mining claim. There are surface indications of gold. He is unable to put down a shaft to bedrock. This costs, varying with the locality, from one to five thousand dollars. He leases to B, reserving as his pay or compensation a certain percentage of the gross or net output. B sinks a shaft. If he discovers gold in paying quantities, well and good. If not, he has lost forever the cost of his labor and prospecting.

The banks advance money for the development of our resources, taking as security these leasehold estates when the mine has been developed. They are to us in a large majority what the warehouse receipt is to the grain merchant.

When, therefore, the integrity of these leases is impaired and the protection which was heretofore deemed to exist for the lessee is taken away, the question becomes, to 75% of the people of Alaska, to the operators, the merchants, the banks, the labor,

one of the utmost gravity. It becomes and is a public question.

And this decision of the Circuit Court of Appeals has utterly impaired the security of every lease for a term of years in Alaska, and made it entirely of no effect as against a prior secret conveyance, even though that conveyance be unattested, unacknowledged and unrecorded.

By way of illustration: A leases a mining claim to B for a term of years, reserving unto himself 25% of the gross output. Before the mine can be operated it is necessary to bring in water from some distant river at a cost of one million dollars, or install a dredge at a cost of a quarter of a million. B searches the records; the title is in A; it has always been there since the location of the claim. B places his lease of record and builds his ditch or installs his dredge, necessitating perhaps the construction of a railroad at an actual cost of say a million dollars. When B has fully completed his preliminary work and is prepared to enjoy the fruits of his labor and investment, C, who has been absent from the District for four years, arrives with a prior deed from A. This deed is not attested, it is not acknowledged. It has never been recorded. Only A and C know whether it is really prior to B's lease, or whether it was manufactured for the purpose of defrauding B of his property.

Under the decision in this case C's unattested, un-

acknowledged, unrecorded deed must take precedence of B's lease, and B must forthwith yield possession of the premises to C.

Can something so grossly unjust and unreasonable be the law which Congress has given to our people? Then no wonder they clamor for self-government and an opportunity to enact their own laws!

If this is law, then what security have we for 75% of our titles?

That the question, then, is one of grave public import must be conceded, and as such it is one of the cases in which this Court will grant its Writ of Certiorari.

That the Circuit Court of Appeals is in grave error in its ruling upon this question is easily demonstrated.

The decision of the Circuit Court of Appeals on this question is not based upon any adjudicated case. No court either in England or this country, has ever held before that a lease for value and without notice is not protected by the recording acts. The decision is based upon erroneous reasoning, and is in direct conflict with every adjudicated case.

The reasoning is as follows:

Section 98 of the Code of Alaska provides:

"Every conveyance of real property within the District hereinafter made which shall not be filed for record as provided in this chapter shall be

void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first recorded."

This statute only affords protection to:

1. Purchasers of real property.
2. Whose conveyance shall be first duly recorded.

A lease for a term of years is a chattel real, therefore it is personal property, and only purchasers of real property are protected.

Before one is protected he must have a conveyance. A lease for a term of years being only personal property, the lease itself is not a conveyance, and therefore not entitled to record, therefore the lessee can never be an innocent purchaser within the purview of the statute.

The above is the reasoning of the Circuit Court of Appeals.

Their error is in this:

I.

Under the very definitions of the Alaska Code, a leasehold estate for a term of years is *an interest in land or real estate*, though of course personal property in the sense that it goes to the personal representative and not to the heir, and the lease itself is a conveyance according to the Code definitions.

Section 181 of the Code provides:

"Real property includes all lands, tenements, hereditaments and rights thereto, and all interests therein, whether in fee simple or for the life of another."

Section 361 provides:

"Definition of Conveyance: The term 'conveyance' as used in Chapters 13, 14 and 15 of this title shall be construed to embrace every instrument in writing except a last will and testament, whatever may be its form and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned or surrendered."

Section 135 provides:

"Definition of Lands: The term 'lands' as used in Chapters 13, 14 and 15 of this title shall be construed as co-extensive in meaning with lands, tenements and hereditaments, and the term estate and interest in lands shall be construed to embrace every interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands as above defined."

Section 1046 provides:

"No estate or interest in real property other than a lease for a term not exceeding one year can be created, transferred or declared otherwise than by operation of law or by conveyance or other in-

strument in writing subscribed by the party creating or transferring or declaring the same, or by his lawful agent under written authority and executed with such formalities as are required by law."

Nothing, then, could be clearer than that under the very definitions of the Code itself a lease is a conveyance of an interest in real property and entitled to record, and when for a period of more than one year must be by conveyance or other instrument in writing, and must be executed with such formalities as are required by law.

These definitions seem to have completely escaped the Court.

But even without these definitions, it is a matter of general law that leases of this character are within the recording acts.

"Leases for a term exceeding that which may be granted by parol are within the mischief sought to be remedied by the recording acts, and are conveyances within the meaning of such acts, although not specifically designated therein."

Am. & Eng. Ency. of Law, Vol. 44, p. 85;

Jones vs. Marks, 47 Cal., 242;

Commercial Bank vs. Pritchard, 125 Cal., 600;

Garber vs. Gianella, 98 Cal., 527;

Flower vs. Pearce, 45 L. Ann., 853;

Spielman vs. Kliest, 36 N. J. Eq., 199;
Johnson vs. Stagg, 2 Johns. 510;
Berry vs. Mutual Ins. Co., 2 Johns. Chancery, 603.

2.

Though called leases, these instruments are in effect grants of the mineral in the ground.

A placer claim is only valuable for the gold contained in the gravel therein. Except for this it has no value whatsoever. Except for this it is worthless.

A leases to B a placer claim for a stated period, only sufficient to extract therefrom all the gold therein contained, reserving unto himself a stated percentage of the gross output.

The amount of gold is a fixed quantity. It can not be changed. If the claim contains one hundred thousand dollars gross, and the reserved percentum is 25%, B receives \$75,000 of the gross, A \$25,000. A's profit is \$25,000, B's profit is \$75,000, less the cost of operating. Their respective profits and interest are fixed, unchanging, unalterable quantities. Suppose all of the gold could be extracted in six months. After this the lease is valueless. The property has been completely exhausted and is worthless.

In discussing this very question, Mr. Curtis H. Lindley, the leading authority among the text writers upon mines and mining rights, says:

"We have already seen that mineral in place is land, and that when it is taken therefrom and changed into personal property, real estate has to that extent been destroyed. It is obvious that the normal relation of landlord and tenant does not contemplate destruction of the estate by the tenant, and that such destruction can not properly be called use. It is equally plain that so-called rent, in a mining lease, is something more than a return for the possession and use of real property. While the contract is in name a lease, it amounts in fact to a sale, and if it grant the right to take all the mineral, it is a sale of the real estate. The lessee's interest is a fee in the mineral, and the lessor's so-called rent is purchase money for the real estate.

"Such rents or royalties are principal and not income, and must be so treated in the ascertainment of the respective interests of life tenants and remaindermen.

"That doctrine, as we have seen, is based upon the principles that mineral in place is land, but a grant of the right to extract and dispose of it and thus destroy its character as real estate, amounts to its sale as land, and that royalties (or so-called rent) payable per quantum of the mineral taken are purchase money and principal rather than rent and income. As these principles follow from the nature of mineral land as such, we can see no reason why they should not be of equal ap-

plication to leases or mineral land acquired from any source" (Sec. 861, Vol. 2).

Plummer vs. Hillside Coal & Iron Co., 104 Fed., 208;

Kingsley vs. Hillside Coal & Iron Co., 144 Pa. St., 613; 23 Atl., 250.

Speaking of mining leases, Lord Cairns said in the House of Lords, in a case there pending:

"Although we speak of a mineral lease or a lease of mines, the contract is not in reality a lease at all, in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase; there is no sowing nor reaping in the ordinary sense of the terms, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there, if he can find them, and to take them away, just as if he had bought so much of the soil."

Scotch & D. Appeals, L. R., pp. 273, 283, 284.

See also:

Consolidated Coal Co. vs. Peers, 37 N. E., 938,

where the Supreme Court of Pennsylvania say:

"The law as we understand it is that a lease of the right and privilege to mine or take away stone or coal from the lessor's land is the grant of an interest in the land and not a mere license to take stone or coal."

"The grant of a right to mine coal in the land of the lessor and remove it therefrom, although the instrument may be called a lease, is a grant of an interest in the land itself."

Hope's Appeal, 3 Atl., 23.

How then, if this be correct, and we submit that it is, can it be said that these instruments of lease and contract are not conveyances of an interest in real estate, when virtually they convey the entire estate?

3.

Both the trial court and the Circuit Court of Appeals entirely ignored the fact that the contract of June 20, 1906, was in no sense a lease.

It is not even called a lease. There are no words of demise. It is not for a term of years. It is a grant of the entire estate on certain percentages "until the premises shall have been thoroughly and completely mined and worked out."

The contract is as follows:

"This Agreement, made this 20th day of June, in the year 1906, by and between Andrew Eadie, J. Potter Whittren, and Frank H. Waskey, all of Nome, Alaska, Witnesseth:

"Whereas, the said Eadie and Whittren are the owners of the Bon Voyage mining claim, situate in the Cape Nome Mining District, Alaska, the location notice whereof is of record in the office of the Recorder of the Cape Nome Recording District, in Book 98, page 296, of the Records of said District; and

"Whereas, the said Eadie and Waskey desire to work and to mine the easterly 440 feet of said mining claim, being all of the claim not heretofore leased by the said Eadie and Whittren to the said Waskey;

"Now, Therefore, in consideration of the premises and of the sum of One Dollar by the said parties paid each to the other, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is agreed as follows:

"The said Eadie and Waskey agree to enter upon the said premises within one day from the date hereof, and thereafter to prospect, work and mine the same in good and minerlike manner so as to take out the greatest amount of gold and gold dust therefrom, with due regard to the continued future working of the said premises and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously for the full term of two years from the date hereof, or until said premises shall have been thoroughly and completely mined and worked out. Cessation of labor for a period of ten days to be deemed a violation of this agreement; to properly timber all shafts

and to keep all shafts, tunnels, drifts and stopes clear and in good and safe condition; to allow the said Whittren or his agents at all times to enter upon and into all parts of the said premises for purposes of inspection, and to be present and to assist at all clean-ups and retorting of the amalgam and the weighing of the retorts, and to give said Whittren or his agents due notice of each and every clean-up. It is agreed that of all the gold, gold dust and other precious minerals and metals mined or extracted from the said premises by the said Eadie and Waskey under this agreement, one-eighth part shall be paid and delivered to the said Whittren immediately after each and every clean-up, and one-eighth part to the said Eadie, and the remainder shall be retained by and equally divided between the said Waskey and Eadie after paying from such remainder all costs and expenses of mining and operating under this agreement. The expense of first locating pay, however, to be borne solely by said Waskey.

"In Witness Whereof, the said parties have hereunto set their hands and seals, in triplicate, the day and year first above written.

J. POTTER WHITTREN.

ANDREW EADIE.

F. H. WASKEY.

Signed, Sealed and Delivered
in the presence of:

P. D. OVERFIELD

F. E. FULLER." ²

² Tr., 58.

How, then, could this be said to be a lease, when it is in terms a grant of the entire estate?

4.

Suppose the lease and contract are mere personal property. Suppose the lease is not a conveyance, and the leasehold estate not an interest in lands or real estate entitling it to be recorded under the registration acts, and therefore not within the purview of the language of the statute. Does this alter the case? Is not an innocent purchaser of personalty as much protected as one of realty?

The decision assumes that an innocent purchaser of personalty is entitled to no protection. An innocent purchaser of personalty, we submit, is entitled to as much protection as one of realty. In this respect the decision is in direct conflict with all authority.

The following authorities hold that an innocent purchaser of personalty in good faith and for a valuable consideration be protected in his purchase:

"A bona fide purchaser has been decided to be one who at the time of his purchase, advances a new consideration, surrenders some security or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor has a right to sell, without notice, actual or con-

structive, of any adverse rights, claims, interest or equities in and to the property sold."

- 1 *Perry on Trusts*, Sec. 237;
- Woodsum vs. Cole*, 69 Cal., 142;
- Woolridge vs. Thiele*, 17 S. W., 340;
- Kingsbury vs. Smith*, 13 N. H., 109;
- Hayden vs. Charter Oak Driving Park.*, 27 Atl., 232;
- McNeil vs. Tenth National Bank*, 46 N. Y., 505;
- Dover vs. Pittsburg Oil Co.*, 143 Cal., 501.

What, then, becomes of the reasoning of the Court upon which this decision is based?

5.

But it is said by the Circuit Court of Appeals that your petitioner Waskey was not a purchaser for a valuable consideration. Why? Because he was to pay royalty out of the proceeds of the mine, and because he was reimbursed for his expense out of the proceeds of the mine.

What is a valuable consideration?

"A valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance."

Stanley vs. Schwalby, 162 U. S., 255.

There certainly seems to be no logic or reason in maintaining that because the consideration expressed is for the payment of royalty and the expenditure of labor in the development of the property that it is not a valuable consideration, or that because the lessee realized some profit on the expenditure of his labor and capital over his expenses, that therefore he had not paid a valuable consideration for the leasehold interest.

If your petitioner had simply agreed to pay rental for his leasehold interest, that would have been deemed a valuable consideration. What matter it if the rental is paid in royalty based upon the output of the mine? Wherein lies the distinction?

And how about your petitioner's agreement to find the gold at his own expense, which he proceeded to do?

Can it be possible that a man agrees to prospect a mine at his own expense; that he does it and spends his time and thousands of dollars, losing other opportunities in other mines, and then that he is only entitled to reimbursement for his risk and speculation? Suppose there had been no pay there. What reimbursement would he get? None, but he would escape a lawsuit. We think this argument very unsound.

Your petitioner advises that this utterance is not based upon any authority, nor does it seem to be supported in principle or reason.

IV.

The Court refused to permit the defendants to avail themselves of the equitable title to the one-fourth vested in Whittren or to preclude Chambers from recovering in any event more than one-fourth.

Even according to the testimony of Chambers at the time of the re-adjustment of their respective interests, it was agreed between Whittren and himself that each should have an undivided one-half interest of what remained in Whittren, that is, an undivided one-fourth each in the property.

To give effect to this understanding, Chambers gave to Whittren the following memorandum agreement:

"May 24, 1906.

"MEMORANDUM.

"This is to certify, that J. Potter Whittren and myself are equally interested in the one-half interest, that is, one-fourth each, in the placer mining claim Bon Voyage in the Nome Mining District, Alaska, staked January 1, 1902, by J. Potter Whittren. Said Whittren is entitled to a deed for one-fourth interest in said claim on demand.

"J. J. CHAMBERS."

This agreement was fully pleaded in Whittren's answer by way of defense, and as an estoppel against

Chambers' claim of right to a half interest in the ground in controversy as follows:

"And for a third further and separate answer and partial defense to the said complaint, and by way of counter-claim, this defendant alleges that the plaintiff ought not to be permitted to allege that he is the owner of an undivided fourth interest in the said Bon Voyage mining claim, or entitled to the possession thereof, or that he has been damaged by the withholding thereof by the defendants, because that on or about the 24th day of May, 1906, this defendant was the owner of the premises aforesaid and in the possession thereof and entitled to such possession, and on said day the plaintiff duly made, executed and delivered to this defendant an instrument in writing signed by the plaintiff wherein and whereby the plaintiff duly acknowledged this defendant to be such owner and entitled to such possession, and promised and agreed to execute and deliver to this defendant, upon demand, a deed conveying unto this defendant the premises aforesaid.

"2. That by reason of the premises the plaintiff is estopped from alleging that he is the owner of the said one-fourth interest in the said mining claim, or entitled to the possession thereof, or that the defendants are wrongfully withholding the same from him, or that he has been damaged in any sum whatever by the holding thereof by the defendants." ³

³ Tr., 64-5.

This defense stood undenied by the reply of Chambers, therefore, under the Alaska code it was admitted to be true.

Section 85, Part IV of the Code provides:

"Every material allegation . . . all new matter in the answer not controverted by the reply shall for the purpose of the action be taken as true."

And this practice has always been followed.

We are certainly, then, at a loss to understand upon what theory the Court instructed the jury as follows:

"You are instructed that the memorandum signed by Chambers and dated May 24, 1906, introduced in evidence by the defendants marked Defendants' Exhibit D, can not under the issues of this case be construed by you as any proof or evidence of title to any portion of the said Bon Voyage claim in the defendant Whittren." ⁴

And again:

"Now I add as a final instruction for your guidance, that if you find for the plaintiff you will find for an undivided one-half of the Bon Voyage claim in controversy against all the defendants, and for damages against them all." ⁵

⁴ Tr., 570.

⁵ Tr., 571.

And again:

"The first question, gentlemen of the jury, for your consideration, is whether the plaintiff is the owner in fee of an undivided one-half interest in said claim, and was so at the time of the bringing of the above entitled suit. Upon your determination of this question practically hinges the whole case. If from all the evidence in the case you find that he is such owner in fee by reason of the conveyance from the defendant Whittren, then your verdict should be for the plaintiff for the possession of an undivided one-half interest in the said claim, together with damages in a sum equal to one-half of all the gold extracted or taken from the said claim by the defendants, less the cost of mining the same."⁶

This was an action of ejectment under the Code. The Alaska Code provides that in an action of ejectment such as this one the plaintiff must not only show title in himself, but a right to the possession.

Section 301 of the Code provides:

"Any person who has a legal estate in real property and a present right to the possession thereof may recover such possession, with damages for withholding the same, by an action."

Section 1 of Title 2, Part IV, provides:

"The distinction between actions at law and

⁶ Tr., 567.

suits in equity and the forms of all such actions and suits, are abolished, and there shall be but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action."

Sections 63 and 64 of Part IV of the Alaska Code provides what shall be contained in an answer, and the latter provides that the defendant may set forth by answer as many defenses and counter-claims as he may have, and these defenses and counter-claims may be legal or equitable.

Thompson vs. Burk, 2 Alaska, 249.

Here, then, we have the Court directing the jury to bring in a verdict for possession of one-half for the plaintiff, when it is admitted by the very pleadings of the case, to say nothing of the proof, that the plaintiff is entitled at most to only a fourth.

How could Chambers under the circumstances be entitled to more than what belongs to him? If the deed without witnesses was good was not the memorandum good? How could he secure judgment for the possession of one-half and damages accordingly, when it stood admitted by the very pleadings in the case that he was entitled in any event to only one-fourth, with damages in proportion?

Yet this was done. In providing for what a defendant may plead in defense to an action to recover

possession of real property, Section 304 of the Code says:

"The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint."

And yet, though the defendants pleaded in terms their equitable right to one-fourth and the estoppel of Chambers to deny the same, and though this plea stood admitted by the reply, the Court directed the jury to disregard it.

That in an action of ejectment a defendant might plead and prove an equitable defense has heretofore been a uniform practice in Alaska.

Thompson vs. Bourk, 2 Alaska, 249;

Pacific Coast Co. vs. Brown, 2 Alaska, 621.

The point has been directly decided by this Honorable Court in

Dickerson vs. Colgrove, 100 U. S., 578;

Hamilton vs. Kirk, 102 U. S., 268;

Quimby vs. Conlan, 104 U. S., 420;

Bohall vs. Dilla, 114 U. S., 47.

And so have been the rulings of several of the Circuit Courts of Appeal.

Berry vs. Seawell, 65 Fed., 742;

Allen vs. Seawell, 70 Fed., 561;

Ward vs. Cochran, 71 Fed., 127;

National Nickel Co. vs. Nevada Nickel Syndicate, 112 Fed., 44.

The case last cited was decided by the Circuit Court of Appeals for the Ninth Circuit and lays down the true rule, which it ignored in the case at bar.

In overruling these decisions, including its own decision referred to, and in holding that in an action in ejectment, a defendant can not avail himself of the defense of an equitable estoppel, the Circuit Court of Appeals has refused to administer the law as fully settled by the highest authorities. And taken in connection also with the special statute of Alaska, allowing equitable defenses, its action in substance amounts to the taking of our property without due process of law.

Consider the injustice of permitting such a decision to stand, when it appears that should Whittren, his grantees, heirs or assigns, institute suit against Chambers to compel the execution of a deed, in pursuance of this memorandum agreement, they would be promptly met with the defense of *res adjudicata*.

Under the practice in Alaska, Whittren having had

the opportunity to plead this as a defense to Chambers' action of ejectment (in fact, he did plead it, and his plea was admitted to be true) the plea of *res adjudicata* on the part of Chambers to a suit instituted by Whittren to compel a conveyance can be urged to be a good plea in bar.

Thus we find that if this decision is permitted to remain undisturbed Whittren and his lessees are without redress as to the one-fourth interest which it was admitted by the pleadings was rightfully in Whittren.

Finally, we submit that when there has been a departure so plain and manifest from all authority and a direct refusal to administer the law as laid down by this Honorable Court, the writ should be granted.

V.

On the trial of the action the defendant offered to prove by Chambers, the plaintiff, "that it was agreed
 " between the plaintiff Chambers and Whittren that
 " inasmuch as the title stood in the name of Whittren,
 " and inasmuch as Whittren was in Nome and the
 " plaintiff Chambers was to remain outside in Seattle,
 " that Whittren was to manage and operate the prop-
 " erty in his own name for their joint benefit, and to
 " make and execute in his own name such contracts
 " and leases with reference thereto as in his judgment
 " was necessary and proper, and that in pursuance
 " to that agreement, the title being in Whittren,
 " Whittren did execute the leases and contracts in-

"troducted in evidence by the defendants Waskey and Eadie in this case, and that the plaintiff Chambers had knowledge of the execution of these leases and contracts, and not only did not object thereto, but on the contrary approved them." ⁷

The Court refused the admission of this testimony.

Is it possible that A, a resident of San Francisco, may deed a parcel of real property to B, of New York, some two thousand odd miles away, thus putting the apparent ownership and title in B, under instructions to B to lease the same or contract with reference thereto, and B, acting under these instructions, leases to C, who takes the lease for a valuable consideration, without notice, without knowledge or means of knowledge, in good faith—is it possible in this event that A will be permitted to oust C from his possession, when C has perhaps expended thousands of dollars in the improvement of the premises?

It would seem the mere statement of the proposition is sufficient to negative it. If such were law, what protection would there be to property?

Yet this is precisely what was decided in the case at bar. Chambers lives in Seattle, some twenty-three hundred odd miles from Nome; he permits the legal title, the apparent ownership, to remain solely in Whittren; he directs Whittren for their joint benefit to lease and contract with reference to the property.

⁷ Tr., 287.

Acting upon these instructions, Whittren leases and contracts with reference to the property. The lessees expend thousands of dollars upon the development thereof. It turns out to be rich. The Court holds the lessees may be ousted at the instance of Chambers.

Suppose the mine, instead of placer, had been quartz, and that, as frequently happens in the development of such properties, the lessees had expended a million or more dollars in the erection of their mills, the procurement of their power supply, and the projection of their shafts and tunnels to develop the veins. Is it possible that they could be ousted at the suit of a silent owner of whose claim they had neither knowledge nor means of knowledge?

What becomes of the principle that as between two innocent persons, he must suffer who has made the injury possible to a third party rather than he who has been completely innocent? That this is a well settled principle of law we have only to cite the following authorities:

“Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him

from disputing, as against them, the existence of the title or power, which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

McNeil vs. Tenth National Bank, 46 N. Y., 325.

See also:

Dover vs. Pittsburg Oil Co., 143 Cal., 505;

Dolbeer vs. Livingston, 100 Cal., 617;

Stewart vs. Metcalf, 68 Ill., 109;

Bigelow on Estoppel, Sec. 445.

Is not this a clear estoppel, and if there is an equitable estoppel *in pais* against the plaintiff, will not the defendant be permitted to avail himself of this defense? This Court said in *Dickerson vs. Colgrove*, 100 U. S., 578:

"The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

This was an action in ejectment in which the Court permitted the defendants to rely as a defense upon an equitable estoppel.

In *Hamilton vs. Kirk*, 102 U. S., 68, which was also a case of ejectment in which the defendants sought to avail themselves of an equitable estoppel *in pais*, this Court said:

"The only serious question upon this branch of the case is whether, consistently with the authorities, the defense (of equitable estoppel) is available to Hamilton in this action of ejectment to recover the possession of the property. There is no principle better established in this Court, nor one founded on more solid considerations of equity and public utility than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel."

In discussing the question as to whether or not the defense of equitable estoppel could be set up in an action of ejectment, which is one of law, this Court said:

"The remedy in such cases lay originally in an application to Chancery, and no redress could be

had in a merely legal tribunal, except under rare and exceptional circumstances, but the common law has been enlarged and enriched under the principles and maxims of equity, . . . and, as these courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary whatever may be the nature of the interest at stake, and there is nothing in the nature of real estate to exclude these wise and salutary principles which are now adopted without scruple in both jurisdictions in the case of personalty, and whatever may be the wisdom of the change through which the law has encroached on the jurisdiction of equity, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decisions."

In *Quimby vs. Conlan*, 104 U. S., 420, this Court again held that an equitable defense might be introduced to an action for possession of real property.

And to the same effect was the decision of this Court in *Bohall vs. Dilla*, 114 U. S., 47.

In fact, it is the modern doctrine as established by the decisions of this Court that equitable defenses being now permitted at law, the complainant in a bill to enjoin the law action because of such equitable defense thereto can not sustain the same as he would

have an adequate remedy at law which would oust the jurisdiction of equity.

So that we are in this peculiar position: Under this doctrine, and under the Code practice of Alaska the only place where our defense is available is in the action of ejectment instituted against us by Chambers. Yet we were not permitted to avail ourselves of this defense in this action.

We submit that in rejecting this testimony, and in denying the defendants the right to avail themselves of those facts which it would have disclosed, not only has every precedent been violated, but every principle of justice and reason.

Finally, your petitioner submits that the case is one of peculiar hardship to himself, and it seems most unconscionable that the respondent Chambers should be permitted to prevail. According to his (Chambers') own testimony, he received an interest in this property in 1902 from Whittren. He did not think the property of sufficient value to even record his deed. He left the District of Alaska without the intention of returning. He made no provision for the management of the property, for its development as a mine, for its prospecting, or even for the continuance of his estate through the performance of the annual assessment work required by law. He remained away from Nome for four years, during which long time the title to the property and apparent ownership remained in the grantors of your appli-

cant. The grantors of your applicant were upon the ground, exercising acts of ownership over the property. They were causing the annual assessment work to be performed each year.

The respondent Chambers resided some twenty-three hundred odd miles from the property in controversy. Your petitioner in good faith, without knowledge, or means of knowledge, without notice, and for a valuable consideration, dealt with those persons in Nome in whom resided the apparent title and ownership of record, and who had for the last four years been exercising acts of ownership over the premises.

At a cost of many thousand dollars, your petitioner prospected and developed the mine, proving the same to be of value.

When your petitioner was about to reap the fruits of his industry and investments, the respondent Chambers arrived with his unattested, unacknowledged, unrecorded, altered deed, alleged to have been made four years before, and ousted your petitioner from the possession of that which was rightfully his, and the Court of Appeals permits him to do so. We submit that in so doing the Circuit Court of Appeals grievously erred.

Wherefore, your petitioner prays:

1. That the writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals in the said case of *Andrew Eadie et al. vs. J. J. Chambers*, No. 1595, to the end that this cause may be reviewed as allowed by the statute of the United States in such case made and provided.

2. That your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with law, and that the judgment of the said Circuit Court of Appeals herein may be reversed by this Honorable Court. And your petitioners will ever pray, etc.

FRANK H. WASKEY,
Petitioner.

ALBERT FINK,
W. H. METSON,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that we have carefully examined the foregoing petition and application for writ of certiorari, and that in our opinion the same is well founded, and that the case is one in which the prayer of the petitioner should be granted by the Court.

ALBERT FINK,
J. C. CAMPBELL,
W. H. METSON,
Counsel for Petitioner.

To Attorneys for Respondent:—

Please take notice that on Monday the 14th day of March, 1910, on the opening of Court on that day, or as soon thereafter as the matter can be heard, we shall move the Supreme Court of the United States at the court room thereof, in the City of Washington, District of Columbia, that the foregoing petition for a writ of certiorari be granted.

Dated at San Francisco this 19th day of February, 1910.

ALBERT FINK,
J. C. CAMPBELL,
W. H. METSON,
Counsel for Petitioner.

Service of the above and receipt of copy thereof, together with a copy of the foregoing petition, is hereby admitted at San Francisco, State of California, this 1916 day of February, 1910.

Attorneys for Respondent.

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Office Supreme Court, U. S.
FILED.

FEB 24 1911

JAMES H. McKENNEY,
CLERK.

~~No. 444~~

In the Supreme Court

OF THE
United States

FRANK H. WASKEY,

Petitioner,

vs.

J. J. CHAMBERS,

Respondent.

221

MOTION OF RESPONDENT TO DISMISS WRIT OF
CERTIORARI ISSUED HEREIN.

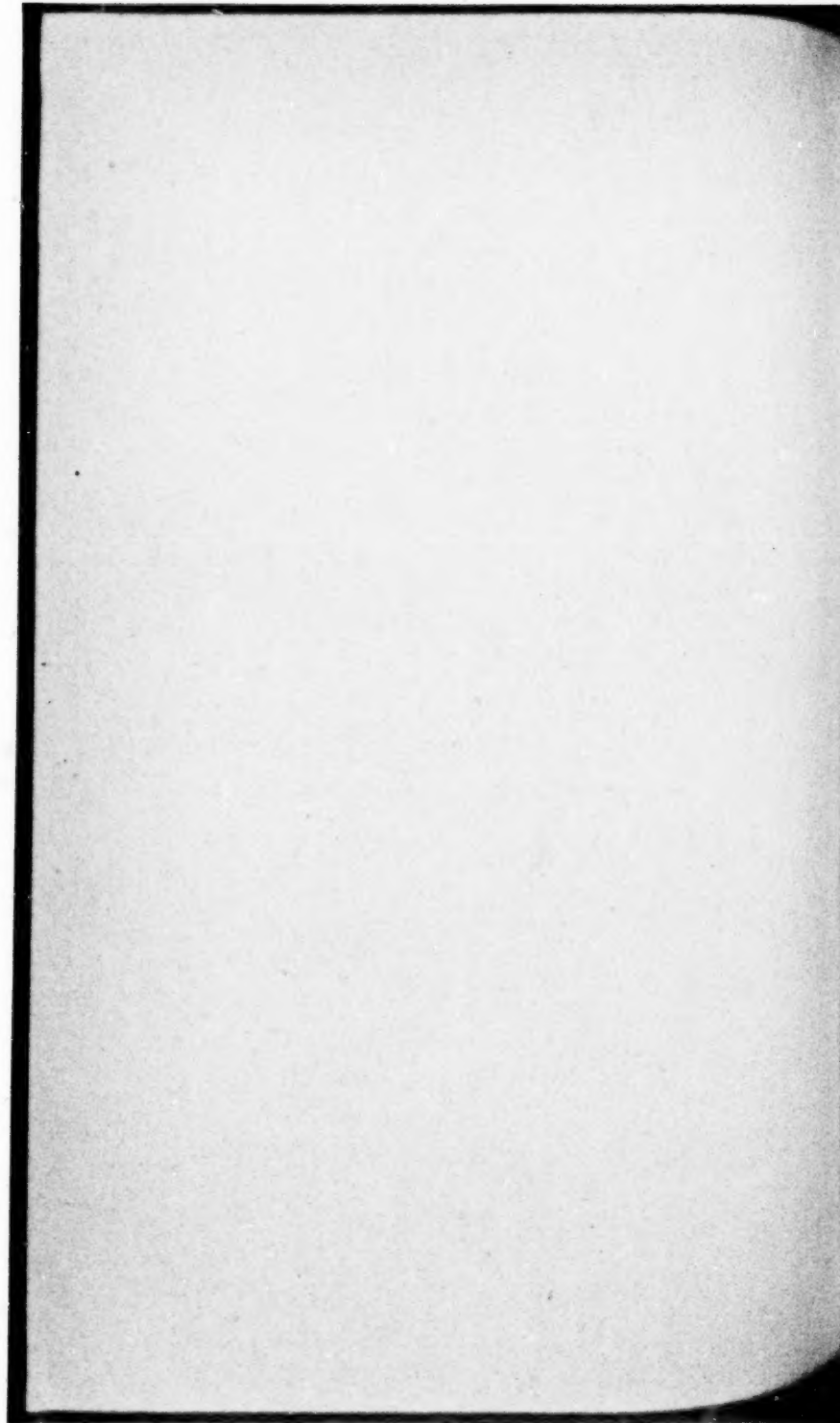
GEORGE W. REA,
Attorney for Respondent.

ALBERT H. ELLIOT,
Of Counsel.

Filed this _____ day of February, 1911.

JAMES H. McKENNEY, Clerk.

By _____ Deputy Clerk.



No. 464

In the Supreme Court

OF THE
United States

FRANK H. WASKEY,

Petitioner,

VS.

J. J. CHAMBERS,

Respondent.

MOTION OF RESPONDENT TO DISMISS WRIT OF CERTIORARI ISSUED HEREIN.

Comes now the respondent, J. J. Chambers, in the above entitled action, and moves the above entitled Court to dismiss the writ of certiorari heretofore issued in said cause to the Circuit Court of Appeals for the Ninth Circuit, and as ground for said motion respondent alleges that this Court was and is entirely without jurisdiction to issue said writ or to make any order in connection therewith. And in that behalf, respondent alleges the following facts appearing of record herein.

The controversy involves the question of title to mining property located in the Territory of Alaska. The original decision was in favor of this respondent and was entered by the District Court of Alaska after the verdict of a jury. On appeal by writ of error sued out by petitioner herein, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the lower Court. Thereafter petitioner applied to this Court for a writ of certiorari alleging various grounds of complaint. Respondent did not appear in opposition to the motion and the same was granted and the writ of certiorari issued. Respondent now alleges that this Court was and is entirely without jurisdiction to issue the said writ of certiorari; that the said judgment of the said Circuit Court of Appeals for the Ninth Circuit has become final; and that an order should be made by this Court herein dismissing said writ of certiorari and all proceedings in connection therewith.

And respondent will ever pray.

J. J. CHAMBERS,

Respondent.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing motion to dismiss the writ of certiorari herein, and that in my opinion, the same is well founded, and that the case is one in which the motion of respondent should be granted.

ALBERT H. ELLIOT,

Counsel for Respondent.

To Attorneys for Petitioner:

Please take notice that on Monday, the sixth day of March, 1911, on the opening of Court on that day, or as soon thereafter as the matter can be heard, we shall move the Supreme Court of the United States, at the court room thereof in the City of Washington, District of Columbia, that the foregoing motion to dismiss the writ of certiorari issued herein, be granted.

Dated at San Francisco, this 4th day of February, 1911.

GEORGE W. REA,
Attorney for Respondent.

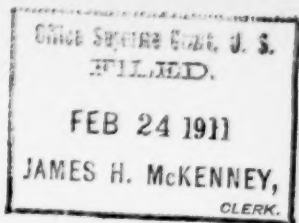
ALBERT H. ELLIOT,
Of Counsel.

Service of the above and receipt of copy thereof, together with copy of the foregoing motion is hereby admitted at San Francisco, State of California, this 4th day of February, 1911.

ALBERT FINK,
J. C. CAMPBELL,
W. H. METSON,
Attorneys for Petitioner.



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In the Supreme Court

OF THE
United States

FRANK H. WASKEY,

vs.

J. J. CHAMBERS,

Petitioner,

Respondent.

221

**BRIEF IN SUPPORT OF THE MOTION TO DISMISS
WRIT OF CERTIORARI.**

GEORGE W. REA,
Attorney for Respondent.

ALBERT H. ELLIOT,
Of Counsel.

Filed this day of February, 1911.

JAMES H. McKENNEY, Clerk.

By Deputy Clerk.



No. 464

In the Supreme Court

OF THE

United States

FRANK H. WASKEY,

Petitioner,

VS.

J. J. CHAMBERS,

Respondent.

BRIEF IN SUPPORT OF THE MOTION TO DISMISS WRIT OF CERTIORARI.

The argument which shows that the Supreme Court can exercise no appellate jurisdiction over cases such as the one at bar, rests upon three propositions as follows:

(a)

The Supreme Court can exercise no appellate jurisdiction (except in cases provided by Section 2 of Article 3 of the Constitution), save "with such ex-

“ ceptions, and under such regulations as the Congress shall make”.

American Construction Company v. Jacksonville Railway, 148 U. S. 373;

In re Dorr, 3 Howard 103;

United States v. Perrin, 131 U. S. 55;

Re Vallandigham, 1 Wallace 243.

The above cases should be distinguished from those cases in which the Supreme Court exercises original jurisdiction which Congress can neither regulate, control nor take away.

United States v. Hudson, 7 Cranch 32;

Cohen v. Virginia, 6 Wheaton 264;

Marberry v. Madison, 1 Cranch 137.

(b)

The Circuit Courts of Appeals Act gives to the Supreme Court jurisdiction to issue writs of certiorari in proper cases.

The Act referred to was passed March 3, 1891, and is entitled “An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes” (26 Stat. L. 826).

The part of the above Act under which the writ of certiorari was issued in the case at bar is as follows:

“That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing

circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,

“And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases,

“Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

“And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be set up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

“And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.”

(c)

The Alaska Code which is found in the Act establishing a civil government for Alaska, supersedes the Circuit Courts of Appeals Act and gives appellate jurisdiction to the Supreme Court in cases originating in the District Court of Alaska, only when the judges of the Circuit Court of Appeals shall certify some question or proposition to the Supreme Court.

The Act setting forth the Alaska Code was approved June 6, 1900, and is known as "An Act making further provision for a civil government for Alaska, and for other purposes" (31 Stat. L. 321).

Section 505 of the said Act reads as follows:

"The judgments of the circuit court of appeals shall be final in all cases coming to it from the district court, but whenever the judges of the circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any case pending before the circuit court of appeals on writ of error to or appeal from the district court, judges may certify such question or proposition to the Supreme Court and thereupon the Supreme Court shall give its instruction upon the questions and propositions certified to it, and its instruction shall be binding upon the circuit court of appeals."

The above Act of Congress was approved at a much later date than the Circuit Courts of Appeals

Act and is the latest attempt of Congress to regulate the appellate jurisdiction of the Supreme Court at least so far as cases originating in the District Court of Alaska are concerned. It is admitted that the judges of the Circuit Court of Appeals did not in the case at bar request the instruction of the Supreme Court upon any question or proposition of law. The direct statement of the section quoted to the effect that the judgments of the Circuit Court of Appeals shall be final excepting in the one case specifically stated, would seem to be conclusive. We do not see how warrant can be found for the issuance of a writ of certiorari under a prior Act which is superseded by the Alaska Act in direct and unequivocal terms.

The same point arose after the passage of the Act establishing the Court of Appeals for the District of Columbia known as "An Act to Establish a Court of Appeals for the District of Columbia and for other purposes", approved February 9th, 1893 (27 Stat. L. 434).

The Supreme Court refused to issue a writ of prohibition because the Act above cited was the latest Act of Congress on the question of the appellate jurisdiction of the Supreme Court, and since under that Act the Supreme Court was not given appellate jurisdiction, it would not issue a writ which was merely ancillary to its appellate jurisdiction.

"This is equally true of this Court, that is to say, that in cases over which we possess neither original nor appellate jurisdiction we cannot

grant prohibition or mandamus or certiorari as ancillary thereto."

In re Massachusetts, 197 U. S. 482.

We submit, therefore, that this Court had no appellate jurisdiction over the case at bar and no power to issue the writ of certiorari herein and the same should be dismissed.

Dated, San Francisco,
February 4, 1911.

Respectfully submitted,

GEORGE W. REA,
Attorney for Respondent.

ALBERT H. ELLIOT,
Of Counsel.



Due service and receipt of a copy of the within is hereby admitted
this.....day of February, 1911.

Attorney for Petitioner.

In the Supreme Court

OF THE
UNITED STATES

FRANK H. WASKEY,

Petitioner,

VS.

J. J. CHAMBERS,

Respondent.

} No. 464.

BRIEF IN OPPOSITION TO THE MOTION TO DISMISS WRIT OF CERTIORARI.

We think respondents' motion to dismiss the certiorari without merit.

It cannot be assumed that Congress intended to give to the people of Alaska any less right to have their causes reviewed by certiorari in this Court than has been granted to citizens of the United States residing elsewhere.

The magnitude of the interests often involved compares very favorably with that of causes com-

ing from other sections of the Union; nor are the questions sometimes raised less important.

The Territory is settled by American citizens, who took with them the same inherent rights to the protection of this Court retained by those who remain in more favored localities.

In a republic, where the laws are uniform and of general application, it would seem a violent presumption to assume that Congress intended citizens residing in Kansas to enjoy privileges denied those living in Alaska.

The people of Alaska are as much entitled to the protection of this Court as those of New York, and perhaps in greater need thereof.

To say that where the Circuit Court of Appeals has committed a manifest error this Court has power to issue certiorari if the case originates in Nevada, but no such jurisdiction if it comes from Alaska would seem an anomaly, and it would appear, if this be true, an inhibition upon residence in that Territory.

Could such have been the intention of Congress? If so, why?

Yet the whole argument of respondents is based upon an implied intention of Congress to repeal by the Act of June 6, 1900, the law as it theretofore stood.

The argument is, that though this Court formerly

had jurisdiction to issue the writ, this power was revoked by the Act of June 6, 1900, making further provision for a civil government for Alaska (31 St. L., 321). Yet this Act was induced by the growing importance of the Territory and the rapid development of its resources.

Its purpose was not to abridge or restrict rights theretofore existing, but, on the contrary, to enlarge, amplify and make further provision therefor.

In this connection, it is peculiarly significant to note that neither the appellate jurisdiction nor procedure was in any respect changed, modified or amended, unless as herein contended by respondents.

By the Act of March 3, 1899, Section 202 (23 St. L., 24), appeals and writs of error in criminal actions were allowed from the judgment of the District Court to the Supreme Court of the United States, or to the Circuit Court of Appeals for the Ninth Circuit, in the same manner and under the same regulations as from the Circuit and District Courts of the United States.

By the Act of June 6, 1900, appeals and writs of error were allowed direct to the Supreme Court of the United States in prize cases, in cases which involved the construction or the application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority was drawn in question, or in which the

Constitution or law of a State was claimed to be in contravention of the Constitution of the United States (Sec. 504).

An appeal was allowed to the Circuit Court of Appeals from any interlocutory order granting or dissolving, or refusing to grant or dissolve, an injunction (Sec. 507).

It was further enacted:

“All provisions of law now in force regulating procedure and practice of causes brought by appeal or writ of error to the Supreme Court of the United States, or to the Circuit Court of Appeals for the Ninth Circuit, except insofar as the same are inconsistent with any of the provisions of this Act, shall regulate the procedure and practice in cases brought to the courts respectively from the District Court for the District of Alaska” (Sec. 508).

By Section 15 of the Act of March 3, 1891, establishing the Circuit Court of Appeals (26 St. L., 826), it was provided:

“That the Circuit Courts of Appeal, in cases in which the judgments of the Circuit Courts of Appeal are made final by this Act shall have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders and decrees of the Supreme Courts of the several Territories as by this Act they may have to review the judgments, orders and decrees of the

District Court and Circuit Courts; and for that purpose the several Territories shall by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits."

There being in the District of Alaska no court of record other than the District Court, it was held in the case of

The Coquitlam vs. United States, 163 U. S.,
347,

that the District Court was to be regarded as the Supreme Court of that Territory within the meaning of the Act above quoted, and of the order of the Supreme Court assigning Alaska to the Ninth Circuit.

In the execution of the duty imposed by the above section, this Court, by an order promulgated May 11, 1891, assigned the Territory of Alaska to the Ninth Judicial Circuit.

It will be thus observed that prior to the Act of June 6, 1900, the appellate jurisdiction of causes originating in the Territory was controlled by the provisions of the Act of March 3, 1891, establishing the Circuit Court of Appeals.

It will be further observed that by the Act of June 6, 1900, no change was made in the then existing law with reference either to the appellate jurisdiction or procedure, unless with the single exception claimed by respondents.

By the Act of June 6, 1900, direct appeals and writs of error were permitted to this Court in the identical cases where such had theretofore been allowed.

Nor was any change made in the prior law as to the allowance of appeals and writs of error to the Circuit Court of Appeals.

So appeals were allowed as theretofore from orders granting or denying or refusing to grant or dissolve an injunction; nor was any change made in the practice or procedure upon writ of error or appeal.

It would seem then somewhat far fetched to assume that Congress, in continuing the identical laws theretofore in effect with reference to this subject, intended to make the single exception claimed by respondents, when no motive therefor can be assigned or conceived.

The exception, permitting this Court to issue certiorari when it sees fit, contained in the sixth section of the Act creating the Circuit Courts of Appeal was designed to give this Court a general supervisory power and control over the decisions of the various Circuit Courts of Appeal, to the end that the decisions thereof might be kept uniform, that flagrant injustice might be prevented and that questions of large public import might receive the final adjudication of this tribunal.

It is not observed how any of these objects would be attained by denying the jurisdiction of this Court

to issue certiorari in a case originating in Alaska. Uniformity of decision would not be secured thereby; flagrant injustice would not be prevented, and the right of this Court to finally settle and determine questions of large public import would be denied.

It is indeed hard to conceive how Congress could intend that a justiciable case arising in the Territory of New Mexico might be reviewed by certiorari from this Court, while the identical cause arising in Alaska could not be.

This is, however, not the first effort that has been made to limit the right of review of causes of action originating in Alaska.

In

The Coquitlam vs. United States, 163 U. S.,
347,

it was insisted that the Circuit Court of Appeals for the Ninth Circuit had no right to review the judgment of the District Court of Alaska, for that: (1) The latter court was not a District Court within the meaning of the sixth section of the Act of 1891. (2) And was not a Supreme Court of a Territory.

And it was insisted that the fact that an appeal or writ of error to the Eighth Circuit, or to the Supreme Court of the United States was permitted from decisions of the United States Court in the Indian Territory by the thirteenth section of the Act creating

the Circuit Court of Appeal was a conclusive indication that Congress did not intend that an appeal or writ of error should lie from the District Court of Alaska to the Circuit Court of Appeals for the Ninth Circuit, for this, being neither a Circuit nor District Court of the United States, nor a Supreme Court of a Territory, it was contended that Congress would have made express provision for review of the decisions of this Court by writ of error or appeal in like manner as it had made provision for review by appeal or writ of error from the decisions of the United States Court of the Indian Territory.

But this Court held, that the whole scope of the Act creating the Circuit Court of Appeal should be looked at and that within the provisions and evident intent of this Act the District Court of Alaska would be considered a Supreme Court of a Territory.

The Court said:

“No reason can be suggested why a Territory of the United States, in which the court of last resort is called a Supreme Court, should be assigned to some circuit established by Congress that does not apply with full force to the Territory of Alaska.

“Looking at the whole scope of the Act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized Territories of the United

States—by whatever name those courts were designated in legislative enactments—should be reviewed by the Circuit Court of Appeals, leaving to this Court the assignment of the respective Territories among the existing circuits.”

In

Lau Ow Bew vs. United States, 144 U. S., 47;
36 L. Ed., 340;

on writ of error to review a decision of the Circuit Court of Appeals for the Ninth Circuit, in a case of habeas corpus, it was suggested that this Court was without jurisdiction to issue the writ.

The argument against the jurisdiction was, that by Section 4 of the Act creating the Circuit Court of Appeals, no review by appeal or otherwise was allowed except as provided in the Act.

Under Section 5, appeals or writs of error were allowed from the Circuit Courts directly to this Court in six specified cases. This case was not one so specified.

By Section 6, it was provided that the Circuit Courts of Appeal

“shall exercise appellate jurisdiction to review . . . final decision of the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law.”

And the same section made the judgments of the Circuit Courts of Appeal final in five specified cases, but this case was not one so specified.

Section 6 further provided:

"In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

The habeas corpus case was one not specified in Section 5, permitting appeals to be taken directly to the Supreme Court, nor in Section 6, as one in which the judgment of the Circuit Court of Appeals was final; nor in the fourth paragraph of Section 6, as a controversy where the matter involved exceeded the sum of one thousand dollars.

Under the express provisions of the Act therefore, it appeared that it could not be taken directly to the Supreme Court from the Circuit Court, nor was it a case in which an appeal lay as a matter of right from the judgment of the Circuit Court of Appeals because of the lack of the jurisdictional amount.

It was insisted that it could not be reviewed by certiorari issued by this Court under the third paragraph of Section 6, permitting this Court:

"In any such case as is *hereinbefore made final* in the Circuit Court of Appeals . . . to

require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination."

for the very obvious reason that it was not a case made final by the decision of the Circuit Court of Appeals.

But this Court very properly overruled this objection to its jurisdiction, holding, that by the Act creating the Circuit Court of Appeals there was an entire distribution of jurisdiction, and that all the appellate jurisdiction not vested in this Court was vested in the court created by the Act—that is, the Circuit Court of Appeals.

Thus, in effect, this Court held, that though the case was not within the terms of the exception contained in the third paragraph of the sixth section of the Act permitting the issuance of the writ on account of its not being a case in which the decision of the Circuit Court of Appeals was final, that nevertheless this Court had the power to issue the writ.

The Court said (*italics ours*):

"The words, 'unless otherwise provided by law,' were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by *contemporaneous or subsequent acts should not be construed as taking it away* except when *expressly* so provided. *Implied* repeals were intended to be thereby *guarded against*."

The argument of respondents, based upon the theory of an implied repeal of the Act creating the Circuit Court of Appeal by the Act of June 6, 1900, is, we insist, in the very teeth of this decision.

This decision was rendered March 14, 1892, and it must be assumed that the Act of June 6, 1900, was passed subject thereto.

As before pointed out, it would indeed be curious if Congress by the Act of June 6, 1900, intended to change the existing law in this particular, without using express language indicating this intention.

In

Forsyth vs. Hammond, 166 U. S., 506; 41 L. Ed., 1095,

referring to the Act of March 3, 1891, creating the Circuit Court of Appeals, this Court said:

"It was foreseen that injurious results might follow if an absolute finality of determination was given to the courts of appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of Federal decision.

"Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that

all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there was placed in the acts creating the courts of appeal, in addition to the other provisions for review by this Court, this enactment" (referring to Paragraph 3 of Section 6).

It would indeed be unfortunate if in Alaska, with its many thousands of miles of seacoast, its sealing, fishing and other rapidly developing industries, such a cause should arise as might involve the most serious international controversy and this Court be found without jurisdiction to review and finally determine the same.

The Court further said (*italics ours*):

"The general language of this clause is noticeable. It applies *to every case* in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this Court to bring before it for review and determination of the case so pending in the Circuit Court of Appeals, and to exercise all the power and authority over it which this Court would have in any case, brought to it by appeal or writ of error.

"Unquestionably the *generality* of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this Court a *comprehensive and unlimited* power.

"All that is essential is that there be a case pending in the Circuit Court of Appeals, and of

those classes of cases in which the decision of the Court is declared a *finality*, and this Court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination.

"We re-affirm in this case the propositions heretofore announced, to wit, that the power of this Court in certiorari extends to *every case pending in the Circuit Courts of Appeal*, and may be exercised at any time during such pendency, provided the case is one, but for this provision of the statute, would be *finally* determined in that court. And further, that while this power is co-extensive with *all possible necessities* and sufficient to secure to this Court a final control over the litigation in *all the courts of appeal*, it is a power which will be sparingly exercised, etc."

So, in

Holden vs. Stratton, 24 Sup. Ct. Rep., 45; 191
U. S., 115;

it was held that certiorari and not appeal was the proper method of obtaining a review in this Court of a decision of the Circuit Court of Appeals revising an order of the District Court allowing an exemption in a bankruptcy case, though such a cause was not one made final by the decision of the Circuit Court of Appeals within the terms of Paragraph 1 of Section 6 of the Act of March 3, 1891, and therefore not one within the terms of Paragraph 3 of Section 6, granting to this Court jurisdiction to inquire

by certiorari or otherwise into any such case as was made *final* in the Circuit Court of Appeals.

So, in

Whitney vs. Dick, 26 Sup. Ct. Rep., 584; 202 U. S., 132;

the Circuit Court of Appeals for the Ninth Circuit discharged a prisoner who had been convicted in the District Court for the District of Idaho, upon an application for habeas corpus and certiorari to the former court.

An appeal was taken by Whitney, the warden of the Idaho penitentiary, to this Court, and afterward a writ of certiorari to the Circuit Court of Appeals prayed for and allowed.

The judgment of the Circuit Court of Appeals releasing the prisoner on the certiorari and habeas corpus was not such a one as is made *final* by Paragraph 1 of Section 6 of the Act of March 3, 1891, and therefore without the terms of Paragraph 3 of Section 6 of this Act granting power to this Court to issue writs of certiorari.

This Court, nevertheless, dismissed the appeal as being improper, but *reversed* the order of the Circuit Court of Appeals on the writ of certiorari.

In re Alexander McKenzie, Petitioner, 180 U. S., 536; 45 L. Ed., 657; 21 S. Ct. Rep., 468;

we submit is directly in point and conclusive of the matter.

Here the petitioner, McKenzie, was appointed receiver of certain Alaska mines. Defendants sought an appeal from the order appointing the receiver, but this appeal was denied because not provided for by the *Act of June 6, 1900*, making further provision for a civil government for Alaska.

Thereupon, the defendants procured from the Circuit Court of Appeals for the Ninth Circuit an order allowing the appeal, certiorari in aid thereof, and supersedeas pending the hearing, but McKenzie refused to obey the writ of supersedeas commanding him to deliver possession of the premises therein described to the defendants, from whom he had taken the same under the order of the District Court appointing him receiver, upon the ground, among other things, that inasmuch as no appeal was allowed by the Act of June 6, 1900, from an interlocutory order appointing a receiver in Alaska, such order was not reviewable by the Circuit Court of Appeals, and the supersedeas was therefore void.

McKenzie was forthwith arrested for contempt of the Circuit Court of Appeals in refusing to obey this supersedeas and such proceedings were had that he was duly convicted and punished therefor.

Upon the judgment of conviction and his due commitment, he made original application to this Court for leave to file a petition for habeas corpus.

Upon the hearing in this Court it was pointed out that under Section 507 of the Act of June 6, 1900, making further provision for a civil government for Alaska, *no appeal was allowable from the interlocutory order appointing a receiver.*

The section is as follows:

"An appeal may be taken to the Circuit Court of Appeals from any interlocutory order granting or dissolving an injunction, refusing to grant or dissolve an injunction, made or rendered in any cause pending before the District Court within sixty days after the entry of such interlocutory order."

It was claimed, however, by those opposing McKenzie's application, that while Section 507 of the Act of June 6, 1900, did not in terms authorize an appeal from an interlocutory order appointing a receiver, that such order was appealable under the provisions of the amendment to Section 7 of the Act of March 3, 1891, creating the Circuit Court of Appeals (31 St. L., 660), and that the *Act of June 6, 1900, applicable to Alaska, should be read in pari materia with the Act creating the Circuit Court of Appeals and the acts amendatory thereof.*

This position was controverted upon exactly the same argument advanced by respondents herein—that is to say, that the Act of June 6, 1900, applicable to Alaska, was a repeal by implication of the act creating the Circuit Court of Appeals, and that if it

had been the intention of Congress to make appealable an order appointing a receiver in Alaska, it would so have appeared in the Act, and that the fact that such an order was made appealable by the amendment to the seventh section of the Act creating the Circuit Court of Appeals, while expressly excluded from section 507 of the Act of June 6, 1900, *was conclusive that it was the intention of Congress that such an order should not be appealable when made by a district court in Alaska.*

But this Court held that the Act of June 6, 1900, applicable to Alaska, should be read *in pari materia* with the *Act of March 3, 1891*, creating the Circuit Court of Appeals, and its amendments, so as to give effect to the provisions contained in the Act of March 3, 1891, but *omitted* from the Act of June 6, 1900.

It is not apparent why the same construction which was extended to section seven should not be applied to section six of the same Act. That is to say, if section 7 of the Act of March 3, 1891, and its amendments, is to be read *in pari materia* with the Act of June 6, 1900, making further provision for a civil government for Alaska, so as to give effect to provisions contained in the former but omitted from the latter, it is not quite clear why section 6 should not likewise be read *in pari materia*, so as to give like effect to a provision in it contained and omitted from the Act applicable to Alaska.

This, of necessity, must have been precisely what Congress intended.

The case of

In re Massachusetts, 197 U. S., 482,

cited by respondents, has no application to the matter under discussion.

Here, a cause in equity was pending in the Supreme Court of the District of Columbia by John B. Cotton, complainant, against Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, Governor of the Commonwealth of Massachusetts, in which the complainant asserted his right to an attorney's lien upon the papers of his client, including a certain warrant for \$1,611,740.85, and prayed, among other things, that Leslie M. Shaw might be restrained from issuing a duplicate thereof, and John L. Bates restrained from asking, demanding or receiving such duplicate.

While this suit was pending in the Supreme Court of the District of Columbia, the State of Massachusetts applied to this Court for writs of prohibition, *mandamus* and *certiorari* to restrain the justices of the Supreme Court of the District of Columbia from taking further proceedings, and entertaining further jurisdiction therein.

This Court merely held, that as it had neither original nor appellate jurisdiction over the controversy, it was without power to grant the prayed for writs as

ancillary thereto, and the reason of the decision is based upon the fact of the existence of a Court of Appeals for the District of Columbia, having appellate jurisdiction over the Supreme Court and to which, of course, this application should have been addressed.

The case would be in point, if the petitioners herein had made their application for *certiorari* to this Court directly from the judgment of the District Court of Alaska, and before the review thereof by writ of error to the Circuit Court of Appeals for the Ninth Circuit.

That this Court is without jurisdiction to issue, when it sees fit, a writ of *certiorari* to review the final decision of the Court of Appeals for the District of Columbia we think will hardly be contended.

Respectfully submitted.

W. H. Metson
 Ira D. Orton
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 Attorneys for Petitioners.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

FRANK H. WASKEY,

Petitioner,

vs.

No. 221.

J. J. CHAMBERS.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

(All Italics Ours.)

The case comes before this Court on a certiorari to the Circuit Court of Appeals for the Ninth Circuit.

The facts are:

January 1, 1902, one Whittren located a placer claim, calling it the "Bon Voyage."

April 21, 1902, Whittren attempted to deed the respondent, Chambers, an undivided interest

in this and other claims. Chambers claims the interest was three-fourths, Whittren insists that it was one-fourth.

This attempted conveyance was attested by only one witness. The Alaska statute requires two (Tr., 49).

In August, 1902, without making any provision for the care of this property, and without recording the deed, Chambers left Alaska for Seattle, some two thousand miles away (Tr., 243-232). There he resided until the summer of 1906, when he returned to Nome.

Whittren remained in Nome. The record title was in his name. In 1903 he surveyed the claim and caused the annual work to be done (Tr., 79). In 1904 he deeded a half interest to Andrew Eadie for performing the assessment work for that year (Tr., 79-72-70).

In 1905 Whittren went to Seattle. In May of 1906 he there met Chambers, who exhibited to him this deed of 1902 (Tr., 67).

Whittren claims the deed showed signs of recent alteration by acids, and that Chambers admitted that he had raised the interest described from one-fourth to one-half. Whittren says he forgave Chambers on account of their former friendship and an intimacy which existed between their wives (Tr., 67).

Chambers, on the other hand, claims that he

ascertained from Whittren that he had deeded a one-half interest to Eadie, and that in Chambers' presence and with his consent, by the use of chemicals, Whittren changed the deed of April 21, 1902, from three-fourths to one-half, he and Whittren agreeing at the time that they would share equally in this one-half, so that each should have one-fourth (Tr., 56).

Chambers then gave Whittren a writing recognizing Whittren's interest to be one-fourth. The writing, wholly in the handwriting of Chambers, was as follows (Tr., 68):

"Seattle, Washington.

"May 24, 1906.

"MEMORANDUM.

"This is to certify, that J. Potter Whittren and myself are equally interested in the one-half interest, that is, one-fourth each, in the placer mining claim Bon Voyage, in the Nome Mining District, Alaska, staked January 1, 1902, by J. Potter Whittren. Said Whittren is entitled to a deed for one-fourth interest in said claim on demand.

" J. J. CHAMBERS."

Whittren and Chambers both agreed that the interest sought to be conveyed in 1902 was altered, and this fact was apparent upon the face of the deed.

Chambers and Whittren discussed the leasing of

the premises upon a royalty basis, reserving twenty-five per cent to themselves. Chambers advocated this, insisting that the lease be given to one Rogers, a personal friend of his. He permitted Whittren to negotiate this matter in Whittren's name (Tr., 262).

Whittren returned to Nome in June, 1906, Chambers remaining in Seattle.

Up to this time the claim was of no known value, and the record showed one-half in Eadie and one-half in Whittren.

June 11, 1906, Whittren and Eadie leased Waskey, your petitioner, the westerly 220 feet of the claim for two years, *reserving 35 per cent* of the gross output, or 10 per cent more than Chambers had theretofore urged Whittren to lease the premises to Rogers for (Tr., 130).

June 20, 1906, Whittren and Eadie, as owners, entered into a contract with Eadie and Waskey as to the balance of the claim, whereby Waskey at his own expense was to prospect for pay dirt, and locating the same was to mine the gold therefrom (Tr., 122).

Of the gross gold extracted 25 per cent was to be paid to Whittren and Eadie, and the balance after deducting the expense of mining (*but not that of prospecting and locating the pay*) was to be equally divided between Waskey and Eadie. This contract was in no sense a lease, and the period of its

operation was to be "*until the said premises shall have been thoroughly and completely mined and worked out*" (Tr., 123).

At all these times the records of the Nome district wherein the "Bon Voyage" was situated disclosed *Whittren as the sole owner* of the claim from 1902 until 1904, when he conveyed one-half to Eadie, since which time he and Eadie appeared as the sole owners.

Waskey had no knowledge or means of knowledge of Chambers' alleged claim to the property. *Chambers' deed had never been recorded*, and Chambers had been absent for four years.

Believing that he had a valid lease and contract, and that he could safely invest his time and capital in the exploration of the mine, *Waskey at an expense of thousands of dollars*, moved a large outfit upon the premises and sank two shafts 80 feet to bedrock (Tr., 125-127).

The title of his grantors and their right to the possession of the property was attacked by adverse parties, and at a large personal expense Waskey defended it (Tr., 129).

Nothing was done by Chambers until Waskey had discovered a rich pay streak, some 80 odd feet beneath the surface of the earth, through the frozen muck and shale. Though Chambers knew of the lease to Waskey by letter from Whittren, *he made no protest to Waskey until long after the lat-*

ter, by his energy and capital had demonstrated the values (Tr., 88).

Then came Dr. Chambers to Nome with his altered deed, and repudiating even his written memorandum of agreement with Whittren, whereby he recognized the latter as owner of a one-fourth interest, filed an action of ejectment against Waskey, Whittren and Eadie, alleging himself the *owner of one-half of the premises* and entitled to the possession thereof (Tr., 11).

Whittren, maintaining that the deed was invalid, answered denying Chambers' title and alleging that Chambers was estopped from claiming more than one-fourth by reason of the writing above set out (Tr., 36).

The plea of estoppel was stricken out of the answer by order of the Court on motion of Chambers (Tr., 320).

To this answer Chambers replied, denying the affirmative allegation thereof.

Eadie answered denying any information as to Chambers' allegations, and alleging ownership of one-half in himself (Tr., 31).

Waskey, *relying upon Whittren's representations*, answered denying Chambers' title, and for a separate defense set up his lease of June 11th and contract of June 20th, alleging himself *to be an innocent purchaser in good faith for value and without notice* (Tr., 17).

Upon the trial of the action with a jury, the Court, over objection, admitted in evidence the alleged deed from Whittren to Chambers, holding that though not good as against an innocent purchaser for value without notice, it was still good as between the parties, and that because Waskey was a *mere lessee* he could not under any circumstances be an *innocent purchaser* for value, and therefore the deed was admissible against him (Tr., 51-52).

The trial court ruled that the writing between Chambers and Whittren whereby the former recognized the latter's title to a one-fourth interest, was of no value, and directed the jury to disregard the same, even though it was admitted in evidence without objection (Tr., 68-285).

The Court directed the jury, if they found for Chambers, to find for one-half (Tr., 285).

As to petitioner's claim that he was an innocent purchaser for value and without notice, the Court directed the jury to disregard such claim, because petitioner being a lessee, *could not be an innocent purchaser* (Tr., 284).

The trial court refused to permit your petitioner to prove that while the apparent title was in Whittren, and that at the time when he, your petitioner, had no knowledge or means of knowledge of any claim of Chambers', he entered into a lease and contract for a valuable consideration without no-

tice and in good faith, *and innocently expended large sums in the development of the property* (Tr., 125).

The trial court refused to permit your petitioner to prove by Chambers that he had left the apparent title to the premises in Whittren under an agreement between Whittren and himself, that Whittren was to have sole and exclusive charge and management of the premises *and was to lease the same* (Tr., 147).

Under these instructions the jury returned a verdict for Chambers for one-half, with damages accordingly. Upon this verdict judgment was rendered in favor of Chambers for one-half of the premises and \$20,000 damages (Tr., 46).

Upon writ of error to the Circuit Court of Appeals, for the 9th Circuit, this judgment was affirmed by a divided Court, *Circuit Judge Ross dissenting* (Tr., 310-315).

THE DECISION OF THE CIRCUIT COURT OF APPEALS.

In the presentation of the writ of error before the Circuit Court of Appeals, the plaintiff in error, defendants below, made five principal contentions:

1. The trial court should have permitted defendants to avail themselves of the written agreement signed by Chambers, wherein his interest was limited to one-fourth.

2. The defendants should have been permitted to prove by Chambers that he had left the apparent title in Whittren under an agreement between them, that the latter should have the sole and exclusive management of the property, and the right to lease the same.

3. The jury should have been permitted to consider the question of *abandonment*.

4. The Court should have held the alleged deed inadmissible against Waskey.

5. The court should not have admitted the alleged deed in evidence.

Though raised by the assignments of error discussed in the briefs, and again pointed out on the oral argument, and set up in the petition for a rehearing, the Circuit Court of Appeals failed to notice or comment upon the first three points. As to the fourth and fifth, the Court found against the contention of plaintiffs in error, in effect holding:

1. That the deed was admissible against Waskey, because he could in no eventuality be regarded as an innocent purchaser for value, for that

(a) He was a lessee.

(b) He had paid no consideration.

2. That the deed was admissible because good as between the parties, even though attested by only one witness.

SPECIFICATIONS OF ERROR.

I.

The Court erred in affirming the judgment when it appeared that defendants below had not been permitted to avail themselves of the equitable title to an undivided one-fourth interest in Whittren, created by the Memorandum Agreement signed by Chambers, pleaded in the answer and erroneously stricken upon motion of Chambers (Tr., 36-60-285-320).

II.

The Court erred in affirming the judgment when it appeared that the trial court had refused to permit defendants below to prove by Chambers that he had allowed the record title to remain in Whittren under an agreement that the latter should have the sole and complete management of the mine with directions to lease the same (Tr., 147).

III.

The Court erred in affirming the judgment, when the trial court had instructed the jury that "*the question of abandonment is not an issue in this case, and any testimony tending to show an abandonment by the plaintiff of any rights theretofore claimed by him, should not be considered by you for that particular purpose*" (Tr., 285).

IV.

The Court erred in affirming the judgment and in holding that the lessee of a mining claim could under no circumstances or conditions whatsoever be an innocent purchaser so as to entitle him to protection against an *unrecorded, unacknowledged unattested secret deed* (Tr., 284-314).

V.

The Court erred in affirming the judgment and in holding that a deed executed in the District of Alaska, and attested by but one witness, was sufficient to convey as between the parties, real property situated therein (Tr., 51-312).

ARGUMENT.

I.

It will hardly be seriously contended that under the Alaska practice, an equitable defense could not be invoked to defeat a recovery by plaintiff in ejectment.

Sec. 1, Tit. 2, Part IV of the Code provides:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits are abolished, and there shall be but one form of action for the enforcement or protection of private rights, and the redress or pre-

vention of private wrongs which is denominated a civil action."

Sec. 63:

"The answer of the defendant shall contain . . . a statement of any new matter construing a defense or counter claim in ordinary and concise language without repetition."

Sec. 64:

"The defendant may set forth by answer as many defenses and counter claims as he may have."

Sec. 301:

"Any person who has a legal estate in real property, and a present right to possession thereof, may recover such possession with damages for withholding the same by an action."

Apparently out of abundant caution and to prevent any contention that a defendant in possession of real property cannot defend an action for its recovery on his equitable as distinguished from his legal title, in dealing with the limitation of actions for the recovery of real property, it was specifically provided in *Sec. 361, Part IV of the Code*:

"Provided this section shall not be construed so as to bar an equitable owner in possession of real property from defending his possession by means of his equitable title."

But irrespective of the statute, the right to interpose an equitable defense to an action of ejectment has long been the settled law. Under the old rule such a defense was available only by a suit in equity, enjoining the action at law; but the courts have long since departed from this practice.

Thus in *Thompson vs. Burk*, 2 Alaska, 249, defendant was permitted to interpose an *equitable defense in an action of ejectment*, the Court saying:

"This is an action of ejectment brought by Thompson; and his counsel urges that under the rule laid down in *Lockhart vs. Johnson*, 181 U. S., 516, the strict legal title must prevail. The Court there said: 'In the Courts of the United States in an action of ejectment, the strict legal title must prevail and if the plaintiff has only equities, they must be presented to and considered on the equity side of the court.' In the case at bar, however, it stands just the other way. It is the defendant here who pleads in his answer an equitable defense against the strict legal title in ejectment set up by the plaintiff."

"Upon the answer under the code system the defendant may protect his possession by equitable defense. *The rule of Lockhart vs. Johnson does not apply.*"

In *Pacific Coast Company vs. Brown*, 2 Alaska, 621, where a motion was made to strike from the answer to a complaint in ejectment, an equitable de-

fense, the Court in denying the motion quoted with approval *Sec. 361 supra*, and ruled:

"An equitable defense may be interposed by defendant in an action of ejectment."

In *Shields vs. Mongolon*, 136 Fed., 547, an action in ejectment brought by writ of error to the Circuit Court of Appeals for the Ninth Circuit, not only was an equitable defense, admitted to a claim in the complaint for an *undivided interest in a mining claim*, but the Court granted affirmative relief and *reformed a deed*. Of like effect have been the rulings of the several Circuit Courts of Appeal in

Berry vs. Seawell, 65 Fed., 742;

Allen vs. Seawell, 70 Fed., 561;

Ward vs. Cochran, 71 Fed., 127;

National Nickel Co. vs. Nevada, 112 Fed., 44;

Dickerson vs. Colgrove, 100th U. S., 578;

Quinby vs. Conlan, 104th U. S., 420;

Bohall vs. Dilla, 114 U. S., 47.

In the Circuit Court of Appeals it appeared from the record that this defense had stood undenied. The case was there argued upon this theory. After the decision in that Court defendant in error filed a certificate of the Clerk of the Trial Court indicating that this defense had been stricken from the answer prior to trial (Tr., 320).

If this be true and for the purposes of this discussion it may be so considered, it in no wise ameliorates the error. It merely intensifies the error, rendering it double instead of single. For here was a defense which under all the authorities was clearly available to defendants, stricken from the answer on motion of defendant.

But this is not all. Under the rule established by this Court, the defense was *available under a general denial* of plaintiff's title, even though there had been no previous pleading thereof.

In *Hamilton vs. Kirk*, 102 U. S., 68, an ejectment in which defendants sought to avail themselves of an equitable defense *under a plea of "not guilty," a mere general denial of the allegations of the complaint*, this Court in discussing the precise question here involved, said:

"The only serious question upon this branch of the case is whether consistently with the authorities the defense (equitable estoppel) is available to Hamilton in this action of ejectment to recover possession of the property. There is no principle better established, nor one founded on more solid considerations of equity and public utility than that which declares that a man who knowingly, *though he does it passively*, looks on and suffers another to purchase and expend money on land under an erroneous opinion of title, *without making known his own claim*, shall not be permitted to

exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel."

"The remedy in such cases lay originally in an application to chancery, and no redress could be had except in a merely legal tribunal, except under rare and exceptional circumstances, but the common law has been enlarged and enriched under the principles and maxims of equity . . . and as these courts apply it to any species of property there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake, and there is nothing in the nature of real estate to exclude those wise and salutary principles which are now adopted without scruple in both jurisdictions in the case of personality. And whatever may be the wisdom of the change through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. *This view is maintained by the main current of decisions.*"

To like effect was the decision of this Court in

Dickerson vs. Colgrove, supra.

Moreover upon the trial, Whittren testified (Tr., 68) that upon their final adjustment of their differ-

ences in Seattle, Chambers had given the following memorandum:

"Dr. J. J. Chambers,
601-3 Alaska Bldg.,
Seattle, Wash.

May 24, 1909.

MEMORANDUM

This is to certify that J. Potter Whittren and myself are equally interested in the one-half interest (that is one-quarter each) in the placer mining claim "Bon Voyage" in the Nome Mining District, Alaska, staked January 1st, 1902, by J. Potter Whittren. Said Whittren is entitled to a deed for a one-quarter interest in said claim on demand.

J. J. CHAMBERS."

This testimony stood undenied. *It was admitted without objection.* Surely it did not lie in the mouth of defendant in error to say it was of no avail because not pleaded, *when the plea had been stricken upon his motion.*

Nevertheless, the Court, after admitting the testimony, instructed the jury:

"You are instructed that the memorandum signed by Chambers and dated May 24th, 1906, introduced in evidence by the defendants marked 'Defendant's Exhibit D' cannot under the issues of this case be considered by you as any proof or evidence of title to any portion of the said 'Bon Voyage' claim in the defendant Whittren."

"Now I add as a final special instruction for your guidance that if you find for the plaintiff you will find for an undivided one-half of the 'Bon Voyage' claim in controversy against all the defendants, and for damages against them all, but if you find against the plaintiff you will find for the defendants jointly for all the premises in controversy."

Here, then, we have a case where a plaintiff both under pleading and proof, confessedly entitled to one-fourth, is permitted to recover one-half.

How could Chambers, under the circumstances, be entitled to more than belonged to him? If the deed without witness was good, should not a like rule be applied to the memorandum of May 24th? How could he secure judgment for the possession of one-half and damages accordingly, when it stood admitted by the proof, that he was entitled in any event, to one-fourth, with corresponding damages?

A moment's consideration will indicate the injustice of permitting such a decision to stand. Should Whittren, his grantees, heirs or assigns, institute suit against Chambers to compel the execution of a deed in pursuance of this memorandum agreement, they would be promptly met with the defense of *res adjudicata*.

Under the practice in Alaska, Whittren having had the opportunity to plead his equitable right to a one-quarter interest as a defense to Chambers'

claim for one-half (*nay, in fact having so plead*) the plea of *res adjudicata* on the part of Chambers in any suit instituted by Whittren to compel conveyance, is necessarily a *good plea in bar*.

Thus if this decision is permitted to remain undisturbed Whittren and his lessees are without redress as to a one-quarter interest, admitted by the proof to be rightfully in Whittren.

We respectfully submit that this consideration alone imperatively demands a reversal.

II.

As heretofore pointed out, defendants had the right to offer, and have received in evidence any proof which negated the plaintiff's claim to ownership, and his right of possession.

As said by this Court in *Dickerson vs. Colgrove*, *supra*, quoting with approval *Cincinnati vs. White*, 6 Pet., 431:

"This is a possessory action and the plaintiff to be entitled to recover must have *the right of possession*, and *whatever takes away this right of possession will deprive him of the remedy by ejectment*. This is the rule laid down by Lord Mansfield in *Atkins vs. Horde*, 1 Burr., 119. 'Ejectment,' says he, 'is a possessory remedy and only competent where the lessor of the plaintiff may enter, plaintiff in ejectment must show a *right of possession as well as in prop-*

erty.' If the plaintiff in the present case was *not entitled to possession*, how according to this authority, could he recover."

On the trial of the action, the defendant Waskey offered to prove by Chambers, the plaintiff (Tr., 147):

"that it was agreed between the plaintiff Chambers and Whittren, that inasmuch as the title stood in the name of Whittren, and inasmuch as Whittren was in Nome, and the plaintiff Chambers was to remain outside in Seattle, what Whittren was to manage and operate the property in his own name for their joint benefit, *and to make and execute in his own name such contracts and leases with reference thereto as in his judgment was necessary and proper*, and that in pursuance of that agreement, the title being in Whittren, Whittren did execute the leases and contracts introduced in evidence by the defendants, Waskey and Eadie in this case, and that the plaintiff, Chambers, had knowledge of the execution of these leases and contracts, and not only did object thereto, but on the contrary, *approved them*."

Here was a case of clear equitable estoppel *in pais*. The title had for over four years stood in the sole name of Whittren. Chambers had been absent since 1902. If now there had been an agreement between Chambers and Whittren that the latter should operate the property as his own, and in

that behalf execute leases thereon, and make contracts with reference thereto, surely every consideration of equity and good conscience would estop Chambers from setting aside such leases or contracts, made with innocent parties.

Again, even though no such agreement or understanding existed between the parties, yet if Whittren, being the apparent sole owner did in face make leases and contracts with reference to the property, and Chambers had knowledge of their execution and did not object within a reasonable time, knowing that the persons with whom Whittren had dealt were expending money upon their faith and credit in his right so to do, another clear case of equitable estoppel has been shown, *and a fortiori is this the case, if knowing of the leases and contracts Chambers approved them.*

Yet, the Court sustained plaintiff's objection to this testimony, and refused its admission.

In *McNeil vs. Tenth National Bank*, 46 N. Y., 325, it is said:

"Where the true owner holds out another or allows him to appear as the owner of or having full power of disposition over the property, and innocent third parties are thus lead into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are

derived from the act of the real owner which precludes him from disputing as against them, the existence of the title or power which through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

In *Dickerson vs. Colgrove, supra*, this Court stated the rule as follows:

"The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he, who by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

Authorities could be multiplied *ad infinitum*. So well settled is the law that further citation is unnecessary.

Can it be possible that A, a resident of San Francisco, may deed a parcel of real property to B of New York, thus putting the apparent ownership and title in B under instructions to him to lease or contract with reference thereto, and B acting under these instructions, leases to C, who takes for a valuable consideration without notice, without knowledge or means of knowledge in good faith—*can it*

be possible in this event A will be permitted to oust C from his possession, or nullify an otherwise valid contract, when C has expended thousands of dollars upon the faith of the apparent right of B to lease or contract?

It would seem the mere statement of the proposition is sufficient to negative it. Yet this is *precisely what happened in the case at bar.*

Chambers lived in Seattle, some 2300 miles from Nome. He permitted the legal title, the apparent ownership to remain solely in Whittren. He directed Whittren for their joint benefit, to lease and contract with reference to the property. Acting upon these instructions Whittren did in fact contract with reference thereto. His contractee expended thousands of dollars in discovery of the pay, the defense of the title and the development of the mine, yet under the decision in this case he is without the pale of protection.

Suppose the mine, instead of a placer, had been a lode and as frequently occurs in the development of such properties Waskey had expended a million or more dollars in the erection of mills, the procurement of power, the sinking of compartment shafts, the projection of tunnels, etc.—it is possible he could be ousted at the suit of a silent owner of whose claim he had neither knowledge nor means of knowledge, who knew of his expenditures and

yet said nothing, *who had permitted the apparent title to remain in him, with whom the contract was made?*

If this be law, what becomes of the principle so lucidly announced by this Court in the authorities above quoted?

Nor can it be said that this defense was not pleaded. Such is not the case. The defense was set forth in the most precise and approved method. In his answer to the second amended complaint (Tr., 17), Waskey in his further and affirmative defense after setting forth the apparent ownership of Whit-tren and Eadie, and the execution of the two contracts alleged:

"That defendant made and entered into said lease (and contract) in good faith for a valuable consideration, without any knowledge or notice whatever of plaintiff's alleged interest in said claim, and defendant commenced and continued to work, mine and operate said claim for a long period of time in like good faith, at great expense and without any knowledge or notice of plaintiff's alleged interest in said claim."

III.

If a case can be conceived in which a jury might legitimately have found that an owner had abandoned his interest in an unpatented mining claim, surely such is the case at bar.

The evidence discloses that Chambers left Nome in 1902. He made no provision for the perpetuation of his title by the performance of the annual assessment work required by law. From 1902 to May, 1906, *he made no inquiry* concerning the property. Whittren testified that in 1903 Chambers advised him to let the claim go (Tr., 65). During all this time he did not return to Nome, and the evidence discloses no intention so to do until after pay had been discovered. Nevertheless the Court instructed the jury (Tr., 285) :

"The question of abandonment is not an issue in this case, and any testimony introduced tending to show an abandonment by plaintiff of any rights thereto claimed by him should not be considered by you for that particular purpose."

Why was it not an issue in the case? The record discloses that it was one of the principal defenses relied upon. If the theory of the Court was that it could not be considered because not pleaded, the answer is that under all the authorities the defense of abandonment to an action of ejectment for an unpatented mining claim need not be pleaded.

The rule has been thus stated:

"Abandonment may arise from a single act, or from a series of acts continued through a long space of time. It is to be determined from all the circumstances of each case. *It need not be specially pleaded, but may be shown under a general denial or general allegation of title.*"

27 Cyc., 597.

Warvelle on Ejectment, par. 241, states the rule as follows:

"The defendant's pleadings are usually confined to the general issue of not guilty, or a general denial of the plaintiff's allegations. Under this plea, as a rule the defendant will have a right to introduce in evidence *any fact which may show or tend to show that the plaintiff had no right of entry when the suit was brought, or which may tend to defeat plaintiff's claim of title.*"

"Abandonment operates instanter where a miner gives up his claim and goes away from it without any intention of returning, and regardless of what may become of it, or who may appropriate it. An abandonment takes place and the property reverts to its original status as part of the unoccupied public domain. It is then *publici juris* and open to location by the first comer. Abandonment may occur at any

time, even after full compliance with the law as to performance of annual labor. *Abandonment may be proved under the general issue.*"

2 *Lindley*, par. 643.

In *Atkins vs. Hendree*, 1 Idaho, 95, the action was ejectment for a mining claim. The sole issues in the case were:

"1. Did the plaintiffs comply with the requirements of the law in the location of their claim, and if so,

"2. Were plaintiffs the owners at the time of the entry of the defendant upon the premises?"

Under these issues the Court held:

"If defendants can show some act of *abandonment* on the part of the plaintiffs of the lode which they claim is separate and distinct from the one held by the plaintiffs, *then they may by such showing, defeat the plaintiffs' right to recover.*"

The precise question was decided in *Wilson vs. Cleaveland*, 30 Cal., 300, where the Court said:

"Nor did the Court err in allowing the defendant to prove abandonment of the premises by the plaintiff, because an abandonment was not pleaded."

This case was reaffirmed in *Bell vs. Red Rock*, 36 Cal., 217, where the Court in speaking of the relevancy of certain testimony, said:

"It was relevant because it tended to prove an abandonment by the plaintiffs long prior to the commencement of the action, and therefore that they had no title to the Monte Cristo claims at the date of the alleged entry of the defendant, *for although abandonment was not specially pleaded, evidence of abandonment was admissible on the question of the plaintiff's title.*"

Again in *Morenhaut vs. Wilson*, 52 Cal., 268, the Court said:

"We have held that an abandonment of mining claims by plaintiff may be shown by the defendant *under the general issue.*"

The rule was again reaffirmed as late as 1896 in *Trevaskis vs. Peard*, 111 Cal., 603, where the Court said:

"The second objection is that no finding is made upon the question of abandonment. Abandonment was not pleaded, *but evidence of abandonment may be given without a special plea under a general denial.*"

It is believed that no case can be found contravening this rule. *How then was the question of abandonment no issue in the case?*

IV.

It is, however, in holding that a lessee can never be an innocent purchaser so as to be protected in his lease against an unwitnessed, unacknowledged, unrecorded deed, produced years after its alleged delivery, that the Circuit Court of Appeals has inadvertently, we think, fallen into an error which if allowed to stand will prove an immeasurable hardship to the people of Alaska.

We say an *unwitnessed* deed because though that under consideration did in fact contain one witness, the construction put upon the statute by the court below obviates even the necessity of this.

Unacknowledged because, under all the authorities when the deed was changed, whether surreptitiously by Chambers as claimed by Whittren, or by mutual consent as insisted by Chambers, the original acknowledgment failed, and even as between the parties, the deed became a new instrument necessitating a new acknowledgment.

The rule is thus stated by *Devlin on Deeds*, Vol. 1., Sec. 462:

"A deed takes effect from the time of its delivery. There can be but one delivery of the same deed. If therefore, a deed is altered in a material respect and again delivered, *this is not a redelivery, but a delivery of a new deed. The deed as altered takes effect at the time of the second delivery.*"

In *Coit vs. Starkweather*, 8 Conn., 293, it is said:

"It is a positive requirement of our law that all deeds of lands shall be attested by two witnesses and acknowledged before a magistrate. No such deed can be valid without a compliance with these requirements. It follows that if the alteration be material, *the deed is fatally defective without a new attestation and acknowledgment.*"

To the same effect is *Stiles vs. Probst*, 69 Ill., 382.

We say *unrecorded* because by all the authorities a deed not entitled to record is *no record at all*, even though in fact placed thereon.

The precise point was decided by the Circuit Court of Appeals for the 9th Circuit, in *Alaska Exploration Co. vs. Northern Mining & Trading Co.*, 152 Fed., 145, where in affirming the decision of the lower court refusing to admit in evidence a certified copy of the record of a deed, the Court said:

"The difficulty in the way of the plaintiff in error is that in order for such record to impart constructive notice to any one, *it is essential that the instrument be entitled under the law to such recordation.*

"It is clear that the certified copy of the record of the recorder of the mining district offered in evidence by the plaintiff in error, did not meet these statutory requirements, for

it showed upon its face that the deed that was recorded was *without acknowledgment* or other proof of its execution, and without the signature of *subscribing witnesses*. It was therefore *not entitled* under the law to be recorded anywhere, and the mere transcription of the unauthorized paper in the record of the mining district *was not constructive notice to any one.*"

As we do not understand that either of the two foregoing propositions of law are controverted, the Court will not be burdened by the citation of further authority.

That this deed was not entitled to record, is obvious, both because in its altered form it was a *new instrument*, and therefore stood without any acknowledgment whatever, and because it was attested by only *one* witness and in its new and altered form, by *none*.

Thus the case is stripped of any question which might otherwise arise had there been a due and proper recordation of this deed prior to the recordation of the lease and contract from Whittren and Eadie to Waskey. The deed not being entitled to record the situation is as if no record was in fact made.

The case presented therefore, is whether or not an unwitnessed, unacknowledged, unrecorded, secret deed produced years after its alleged original delivery, shall take precedence over a duly executed

and recorded lease, accepted in good faith for a valuable consideration without any knowledge or means of knowledge of the prior deed.

Sec. 98, part V, provides:

"Every conveyance of real property within the district heretofore made, which shall not be filed for record as provided in this chapter, shall be void against any subsequent innocent purchaser in good faith, and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

The Circuit Court of Appeals held this statute to afford no protection to your petitioner, because:

- A. He was a lessee.
- B. He had paid no consideration.

A.

The reasoning upon which the first proposition is made to rest, syllogistically stated, is:

Only conveyances of real property are within the protection of the statute.

A lease is not a conveyance of real property.

Therefore a lease is not within the protection of the statute.

Conceding *arguendo*, the soundness of the major, though as has been pointed out, plaintiff in error,

irrespective of any statute, is entitled to full protection upon every principal of equitable estoppel *in pais*, we come at once to the consideration of the minor premise.

A lease is not a conveyance of real property.

It is most earnestly insisted that this proposition involves two fatal errors.

1. It is not a correct statement of the law as applied to registry and recording acts, and in this connection can not be sustained upon

(a) Principle.

(b) The statutes of Alaska.

(c) Analogous authority.

(d) The definition of eminent text writers.

(e) Direct authority.

(f) Nor upon the authorities cited by defendant.

2. It assumes that the contracts in question are in fact leases when such is not the case.

ON PRINCIPLE.

This Court will take judicial notice that the greater portion of the District of Alaska is suitable by nature to no other pursuit than that of mining. Ninety per cent. of the present population is engaged in this vocation and its collateral branches. Seventy-five per cent. of this industry is conducted under the *so-called royalty leases or contracts*. In fact, there is no other character of leases let save those based upon the production of the mines.

Under and by virtue of the operation of these leasehold estates, the mineral resources of the District have been developed.

To illustrate: A stakes a mining claim. There are surface indications of gold. He is unable or unwilling to put down a shaft to bedrock. This costs, varying with the locality, from one to five thousand dollars. He leases to B, reserving as his pay or compensation a certain percentage of the gross or net output. B sinks a shaft. If he discovers gold in paying quantities, well and good. If not, he has lost forever the cost of his labor and prospecting.

The banks advance money for the development of our resources, taking as security these leasehold estates when the mine has been developed.

When, therefore, the integrity of these leases is impaired, and the protection which has been here-

tofore deemed to exist for the lessee is taken away, the question becomes, to 75% of the people of Alaska, to the operators, the merchants, the banks, and labor, one of the utmost gravity.

This decision of the Circuit Court of Appeals has utterly impaired the security of every lease for a term of years in Alaska, and made it entirely of no effect as against a prior secret conveyance, even though that conveyance be unattested, unacknowledged and unrecorded.

By way of illustration: A leases a mining claim to B for a term of years, reserving unto himself 25% of the gross output. Before the mine can be operated it is necessary to bring in water from some distant river, or install a dredge at large cost. B searches the records; the title is in A; it has always been there since the location of the claim. B places his lease of record, builds his ditch or installs his dredge, necessitating perhaps the construction of a railroad at enormous cost. When B has fully completed his preliminary work and is prepared to enjoy the fruits of his labor and investment, C, who has been absent from the District for four years, arrives with a prior deed from A. This deed is not attested, it is not acknowledged. It has never been recorded. Only A and C know whether it is really prior to B's lease, or whether it was manufactured for the purpose of defrauding B of his property.

Under the decision in this case C's unattested, un-

acknowledged, unrecorded deed must take precedence of B's lease, and B *must forthwith yield possession of the premises to C.*

If something so obviously unjust and unreasonable be the law which Congress has given to our people, no wonder they clamor for self-government and an opportunity to enact their own laws.

Nay, further: if this decision is permitted to stand there is no lessee in the District, without the statute of limitations, immune from attack by the holder of a prior unrecorded deed, for obviously if a lessee can under such circumstances be ejected, *he may be held liable for the value of the gold extracted.*

THE STATUTES OF ALASKA.

If the statute (Sec. 98, *supra*), stood alone, and the word "conveyance" were taken in its narrow and more restricted sense, there might perhaps be some merit, in logic at least, in the argument. But such is not the case, for by the same Code, Sec. 181, Part V, the term "*real property*" is defined to mean:

"and the term real property includes all lands, tenements and hereditaments and the rights thereto, and all interests therein whether in fee simple or for the life of another."

Thus *real property* includes within its terms "*lands*" and "*all interests therein.*"

By *Sec. 135, Part V*, "lands" is defined to mean:

"The term lands as used in Chapters Thirteen, Fourteen and Fifteen of this title shall be construed as coextensive in meaning with lands, tenements and hereditaments, and the term estate and *interests in lands shall be construed to embrace every interest, freehold and chattel*, legal and equitable, present and future, vested and contingent in lands as above defined."

Thus by the very statutory definitions, the "*chattel real*," the leasehold estate is included within the term "*real property*."

That the word "conveyance" as used in *Sec. 98, supra*, includes a lease for a term of years, is equally clear, for by *Sec. 136, Part V*, that too is expressly defined as:

"*The term conveyance* as used in Chapters Thirteen, Fourteen and Fifteen of this title, shall be construed to embrace every instrument of writing except a Last Will and Testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created alien, assigned or surrendered."

So *Sec. 1046 of Part IV* provides:

"No estate or interest in real property, *other than a lease* for a term not exceeding one year . . . can be created, transferred . . . oth-

erwise than by operation of law or by a conveyance or other instrument in writing, subscribed, by the party"

Thus a lease for a term *exceeding one year* is both an *interest in real property* and a *conveyance*.

Nothing then could be clearer than that under the very definitions of the Code itself,—a lease is a *conveyance of an interest in real property and entitled to record*, and when for a period of more than one year, must be by *conveyance* or other instrument in writing and must be executed with such formalities as are required by law.

So, Sec. 15, Part III, providing for the recordation of instruments, prescribes:

"The respective recorders shall record separately in large and well bound separate books in clear hand:

"First. Deeds, grants *leases* which have been acknowledged or proved, mortgages upon personal property."

If now the recordation of a lease means nothing and has no other or greater efficiency than that given it under the decision herein, it would seem that the provision for its recordation was a wholly *unnecessary, useless and idle act*.

The provisions of the statute above quoted as well as the seemingly irresistible inferences to be drawn

therefrom, seem to have entirely escaped the attention of the learned Court below.

It will no doubt be said that the broad definition given to "lands" and "*conveyances*" in *Secs. 135* and *136* are by the terms of the section limited to *Chapters 13, 14, 15*, and therefore such definition is not to be extended to *Sec. 98* which is included in *Chapter 11*.

A like observation might with equal justice be made to the narrow and restricted definition claimed by defendant in error, as set forth in *Sec. 181*, for by the terms of that section the definition is expressly limited to *Chapter 18*, concerning the "descent and distribution of property."

"the word issue as used in *this chapter* . . . and the term *real property*, etc."

Obviously *as used in this Chapter*.

These different Code definitions but emphasize the fact that the terms *real property* and *conveyances* are not necessarily always employed to express the same meaning, but frequently vary in accordance with the purpose sought to be accomplished.

If the term conveyance has the same meaning in all statutes wherever employed, then necessarily the judgment of the Circuit Court of Appeals upon this point is correct. If on the other hand it can be shown that the term "conveyance" has two or more definite meanings, one enlarged and one re-

stricted, and is often employed in statutes in the same jurisdiction as in Alaska to express a different signification, the inquiry will be what was reasonably intended by its use in the statute with reference to the recordation of instruments now under consideration (*Sec. 98*).

That the term "conveyance" has different meanings and is not always used with the same significance can be easily shown. The rule has been stated as follows:

"At common law the term *conveyance* has been defined to mean an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another.

"In the *narrower* sense of the word it signifies the instrument employed to effectuate an ordinary purchase of freehold land (e. g. the modern deed) as opposed to settlements, wills, leases, petitions, etc."

9 *Cyc.*, 862.

That the term has a different meaning in the same jurisdiction can not be better illustrated than by two cases from California.

Sec. 27 of the Act of 1850 provides:

"Every power of attorney or other instrument in writing containing the power to convey any real estate . . . shall be acknowledged or

proved, certified and recorded as other conveyances"

In *Billings vs. Morrow*, 7 Cal., 174, it was held that a certain power of attorney did not authorize the sale of real estate and contained *no authority to convey*.

In a subsequent case, *Jones vs. Marks*, 47 Cal., 243, the same power of attorney was again before the Court, and it was insisted that inasmuch as it had been decided in the prior case that it did not authorize the execution of a conveyance, *it was not entitled to record*. But the Court held that though the power of attorney did not authorize an outright conveyance, nevertheless it was sufficient to warrant the execution of a lease, and that inasmuch as a lease was a *conveyance within the recording acts*, the power of attorney was properly entitled to record under the provision of the statute heretofore quoted. The Court said:

"But in that case (referring to *Billings vs. Morrow*), the conveyance relied upon was an *absolute deed* in fee, and the point decided was that Schoolcraft had no authority to execute an instrument of that character, but we have no doubt that he had authority to execute a lease for a term of years. This would not have been an executory contract for the sale of land, nor a conveyance within the ruling in *Billings vs. Morrow*, and yet it would have been a *con-*

veyance within the definition of that term as used in sections 27 and 36 of the Recording Act, and would have created an interest in real estate."

So, though it was decided by the Court of Chancery of New York in *Tone vs. Brace*, 11 Paige Ch., 566, that the term "*conveyance*" as used in a statute providing "*That no covenant shall be implied in any conveyance,*" did not comprehend a lease for a term of years. The identical decision of the Supreme Court of Oregon (upon which the judgment in the present case is predicated), nevertheless the Supreme Court of Judicature of the same State, speaking through Chief Justice Kent, decided in *Johnson vs. Stagg*, 2nd John., 510, that a statute providing for the recordation of "*mortgages of any lands, tenements and hereditaments*" included within its comprehension the mortgage of a leasehold estate. The Chief Justice said:

"I admit that by the old rule of law, those words would comprehend only freehold estates and not leases for years. 'The statute of 32 Hen. VIII against selling pretended titles speaks of any right or title to any lands, tenements or hereditaments.' Yet it was held in the case of *Partridge vs. Strange*, 1 Plowd., 87, that a lease for years was a title within the act, because it was within the *mischief guarded against*. I conclude therefore that the mort-

gage in the case before us ought to be considered as coming within the Registry Act, and that it was consequently duly registered on the 14th day of September, 1795."

So in Montana, where a statute provided that an appeal might be taken from orders directing a conveyance of realty in probate proceedings, the Court held in *re Tuohy's Estate*, 58 Pac., 722, that a lease was *not a conveyance* within this statute, but *was a conveyance in the recording acts*. The Court said:

"The question here turns upon the construction to be given to the word "*conveyance*." In Civil Code 1642, the term conveyance for the purposes of recordation embraces every instrument in writing by which an estate or interest in real property is created, aliened, mortgaged or encumbered, or by which the title to real estate may be effected, except Wills.

"Under section 1641 leases for terms exceeding one year are required to be recorded; therefore this class of leases falls within the meaning of conveyances as used in section 1642, but we apprehend that the term as used in section 1722, *supra*, is used in a more restricted sense and falls within the definition of that term as applied to the actual transfer of the title to lands and interest therein and does not include the hiring of real estate at a fixed rental for a term of years."

ANALOGOUS AUTHORITY.

Nor can the position be sustained upon analogous authority, for—

In *Springfield vs. Ely* (Fla.), 32 So., 813, it was held, that within a statute requiring a married woman in order to bind her separate estate for her husband's debts, to execute an instrument in writing according to the law respecting conveyances by married women, the word "*conveyance*" was used in a *broad sense*, and included conveyances of both *real and personal property*.

In *Cogan vs. Cook*, 22 Minn., 137, an instrument executed by the grantee in a deed reciting that the latter was given as a mortgage, and agreeing to quit claim on payment of the debt, was held a *conveyance* within the meaning of a statute requiring any *conveyance to be acknowledged or proved*.

An ante-nuptial contract for conveyance of lands upon the death of the intended husband to be void in the event of his surviving, was held a *conveyance within the recording acts*.

Altman vs. Petty, 59 Mich., 482; 26 N. W., 680.

An assignment for the benefit of creditors has

been held a conveyance within the meaning of the insolvent laws.

Prouty vs. Clarke, 73 Iowa, 55; 34 N. W., 614;

Weston vs. Layhed, 30 Minn., 221; 14 N. W., 892.

The term "*conveyance*" as used in an act authorizing a creditor to attack after judgment was held to embrace an assignment of a chose in action.

Wilson vs. Beadle, 39 Tenn. (2nd Head), 510.

An assignment of a mortgage is a *conveyance within the recording acts*.

Larned vs. Donovan, 32 N. Y. Sup., 731;

Merrill vs. Luce, 6 S. D., 354; 61 N. W., 43;

Burns vs. Berry, 42 Mich., 176; 3 N. W., 924;

Swarey vs. Emerson, 168 Mass., 118; 46 N. E., 426;

Hennings vs. Johnson, 9 N. D., 489; 84 N. W., 350;

Hull vs. Diel, 21 Mont., 71; 52 Pac., 782;

Butler vs. Bank, 94 Wis., 351; 68 N. W., 998.

A certificate of an execution sale of lands is a *conveyance within the recording acts*.

Drake vs. McLean, 47 Mich., 102; 10 N. W., 126.

In *Greeg vs. Owens*, 37 Minn., 61; 33 N. W., 216, it was held that the word "conveyance" as used in a suit requiring a husband to join with his wife in the sale of her lands was used in its *more general sense and included a contract for such sale*.

In *Corse vs. Legget* (N. Y.) 25 Barb., 389, it was held that the word "conveyance" as used in a statute providing that no trusts should be created or declared unless by a deed or conveyance in writing, comprehends a *declaration of trusts, although not under seal*.

That the term "conveyance" as used in the recording acts, includes a real estate mortgage has been universally decided.

Pickett vs. Buckner, 45 Miss., 226;

Merrill vs. Luce, 6 S. D., 354; 61 N. W., 43;

Burns vs. Berry, 42 Mich., 176; 3 N. W., 924;

Oddfellows vs. Banton, 46 Cal., 303;

Allison vs. Mansky, 118 Wis., 11; 94 N. W., 659.

In *Bingham vs. Frost* (U. S.), 3 F. C., 401, it was held that the word "conveyance" as used in the

Bankruptcy Act is a *generic term*, including *all proceedings* to dispose of or encumber property in derogation of the equality of creditors.

In *State Trust Co. vs. Casino*, 46 N. Y. Sup., 492, it was held that the term conveyance comprehended the *mortgage of a leasehold interest*.

In *Patterson vs. Jones*, 89 Ala., 388; 8th So., 77, it was held that the term "*conveyance of property*" as used in an act authorizing the admission of conveyances of property in evidence, without proof of execution, when they have been acknowledged or proved, and recorded as required by law, *includes a mortgage of personal property*.

The term "*conveyance*" was held to include the *receipt*, issued by the receiver of the land office, on payment of the purchase price.

Crawley vs. Johnson, 21 Fed., 492.

Even the release or partial release or satisfaction of a mortgage has been held a *conveyance within the recording acts*.

Baker vs. Thomas, 15 N. Y. Supp., 359;

Bacon vs. Van Schoonhoven, 87 N. Y., 446;

Merchant vs. Woods, 27 Minn., 396; 7 N. W., 826;

Palmer vs. Bates, 22 Minn., 532.

DEFINITIONS OF TEXT WRITERS.

A lease is defined by the law dictionaries and text writers as follows:

"A lease is a conveyance of any lands or tenements made for life, for *years or at will*."

Anderson's Law Dictionary.

"A lease is a *conveyance* of lands or tenements to a person for life, for a *term of years* or at will in consideration of a return of rent or some other recompense."

Black's Law Dictionary.

"A lease is a *conveyance* of lands or tenements made for life, for *years or at will*."

2 *Blackstone's Com.*, 317.

"A lease is a contract for the possession and profits of lands and tenements, or else it is a *conveyance* of lands and tenements to a person for life, for *years or at will*."

Greenlf. Cruise, 372, ch. V, Sec. 54.

"A lease is a contract in writing under seal whereby a person having a legal estate in hereditaments corporeal or incorporeal *conveys* a portion of his interest to another."

Arch. L. & T., 2.

"A lease is *the grant* to the possession of lands to a person for life, *for years* or at will."

Watkins on Conv., 425.

"A lessee of real estate for a term of years is fully entitled to the protection of the recording acts. . . . So the recording acts apply to mortgages of such leasehold estates as well as to mortgages of freehold estates. Leasehold interests, and conveyances and mortgages thereof, are not only within the terms, but also *within the spirit and intent of the recording acts*, inasmuch as they are equally within the *mischief* they are intended to remedy; nor do such mortgages come under the provisions relating to the recording of mortgages of personal property, as these latter have reference only to chattels personal."

Webb on Record & Title, Sec. 28, p. 62.

"Leases for a term exceeding that which may be granted by parol are within the mischief sought to be remedied by the recording acts, and are *conveyances within the meaning of such acts, although not specifically designated therein.*"

44 *Am. & Enc. Law*, 85..

DIRECT AUTHORITY.

The judgment of the court below is opposed to all direct authority upon the question presented:

Sec. 1214, Code Civ.
Proc. California:

Sec. 98, Chap. 11, Part
V, Alaska Code:

"Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof in good faith, and for a valuable consideration, whose conveyance is first duly recorded . . ."

"Every conveyance of real property within the district hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

For all purposes essential to this argument it will be observed that these sections are identical. Both have their origin from the Code of New York.

In *Garber vs. Gianilla*, 98 Cal., 527, the question was between an unrecorded lease and a subsequent deed, and it was argued that a lease not being a conveyance within the meaning of the sections above quoted, no record thereof was necessary, but the Court held:

"As the lease to defendant from his father was not recorded there was no constructive notice thereby to plaintiff of its existence. The lease was a conveyance of the land within the definition of section 1215 of the Civil Code and the interest in the land that was created in the defendant, though limited to a right to receive the products of the land was void as against the plaintiff, *by reason of the failure to have it recorded, as if it had been an unrecorded conveyance in fee.*"

The foregoing decision was approved in *Commercial Bank vs. Pritchard*, 126 Cal., 600, where a lessee had constructed a warehouse upon the demised premises. To secure a loan from plaintiff, he executed a mortgage on the warehouse and an assignment of his lease, thereafter transferring the property to defendant for a valuable consideration. In a suit by plaintiff *to foreclose*, it was suggested that the lease was *personal property*, but the Court held:

"The lease made by the Railway Company to Pritchard was a conveyance of real estate."

In *State vs. Morrison* (Wash.), 52 Pac., 228, an action was brought to set aside a lease of realty to an alien, under a statute providing:

"And all *conveyances of land* hereafter made to any alien shall be void."

It was argued that the conveyance referred to did not include a lease, but the Court held the *contrary*, saying:

"We think that the section must be given a *reasonable interpretation*. If a lease for a term of ninety-nine years can be sustained, then why not one for 999 years?"

In *Spielmann vs. Kliet*, 36 N. J. Eq., 199, the contest was between the mortgagee of a leasehold interest and the mortgagee of the fee. The question presented to the Court was whether or not a lease under the statute was so entitled to record as to constitute constructive notice. *The precise question here presented*. The statute provided:

"Every deed or conveyance of or for any lands, tenements or hereditaments to any purchaser of the same . . . shall be void and of no effect against a subsequent judgment creditor or *bona fide* purchaser or mortgagee for a valuable consideration, not having notice thereof, unless such deed or conveyance shall be acknowledged or proved and recorded . . . within fifteen days after the delivery of the same."

The Court held that the lease for a term of years *was a conveyance within the meaning of this statute*,

and when duly recorded, constituted a constructive notice. The Court said:

"The language of the statute is, 'every deed or conveyance of or for any lands, tenements or hereditaments, to any purchaser of the same.' *Is a lessee a purchaser.*

"It would seem that there should be no doubt that a lease for a term of ten years is a conveyance of lands within the meaning of the statute under consideration, and, as such, entitled to be recorded. But it may be said the books say that a lease for years confers no estate in the lands demised by it, for though the term granted by it may exceed the duration of many lives, yet it simply confers a term or a mere chattel interest. This, it can not be denied, was the ancient view, and it is likewise undeniable that the ancient doctrine was founded on principles which have no application to modern times, or to society as it exists under a republican form of government. I think it is safe to say that in this commercial age, which reverences fact much more than it does fiction, and pays no special homage to any class of citizens, and bestows no extraordinary privileges on military men, a grant which gives to the grantee a right to the possession of lands for a term of three or five hundred years, would be esteemed everywhere a great deal more valuable, and entitled to much more consideration, than the grant of a term to run during the successive lives of any

three mortals. And it would be so in fact. A different estimate of the dignity or value of the two grants rests on fancy and not on fact."

In *State vs. Inhabitants* (N. J.), 33 Atl., 852, the common council granted a lease for a term by resolution. The Charter gave the inhabitants the right to purchase, receive, hold and convey any estate, real or personal, for the public use of said corporation. The power given to the common council was merely to regulate, manage and control property. The question before the Court was whether or not under the power to regulate, the council had the power to convey. The Court said:

"A lease is a conveyance of real estate, and the power to convey is vested in the inhabitants of the town in their corporate name. The management and control of the real estate is lodged in the common council, and the only mode pointed out for exercising that power is by ordinance. This excludes the right to proceed by resolution. Therefore the resolution was void."

In *Flower vs. Pearce*, 45 La. Anno., 853, the statute provided:

"All sales, contracts, judgments, and acts affecting or concerning immovable property not recorded according to law, shall be utterly null and void except between the parties."

It was held that a lease was within the provision of the statute, and to be effective as against an attachment creditor *must be duly recorded*.

In *Payne vs. Mason*, 7 O. St. Rep., 199, the contest was between a mortgagee of the fee and a mortgagee of the leasehold estate for a term of 10 years. The lease had neither been witnessed nor acknowledged, but the mortgage thereof was duly placed of record. The Court said:

"Now, the tenant, Butts, was in possession of the premises mortgaged, under a lease *good in equity* for the term of ten years, and had made extensive improvements thereon. The possession itself was a species, though the lowest species, of legal title; and we think its voluntary assignment by him would carry with it the equities under which it was held. We are of opinion that the estate of Butts in the premises mortgaged comes *fairly* within the terms of the act to which reference has been made, and is also within the *scope of its policy*. The policy of the act is, *to prevent frauds and protect innocent purchasers*. Terms for years, which, by common law, are but chattels real, are often of greater value *in fact* than estates for life, which belong, technically, to the higher class of freehold estates; and to hold that the former may legally be conveyed or incumbered without the formalities prescribed for the conveyance or incumbrance of the latter, would open a wide door to the admission of evils against which the statute was intended to guard."

In *St. Vincents vs. Kingston* (Pa.), 72 Atl., 839, it was held that the word "*deed*," as used in an act providing for the acknowledgment and recording of deeds, included not only conveyances of lands, tenements and hereditaments in the strict technical sense of that phrase, but also *leases* exceeding twenty-one years; and *any deed* intended to grant *any estate* for life, or years, even though the latter is but a chattel interest subject to sale or execution.

In *Crouse vs. Mitchell* (Mich.), 90 N. W., 32, the statute provided:

"Every conveyance of real estate within this State, hereafter made which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration of the same real estate, or any portion thereof whose conveyance shall be first duly recorded."

It will be observed that this statute is almost a verbatim reproduction of *Section 98 of the Alaska Code*. Nevertheless, the Court held:

"Taking all these provisions of law, and construing them together, we think it clear that this lease which had *eight or ten years to run* was such a conveyance of the interest in lands as to make the real estate recording laws applicable to it."

In *Milliken vs. Faulk* (Ala.), 20 So., 594, the statute provided:

"Conveyances of unconditional estates, and mortgages, or instruments of the nature of a mortgage of real property, etc., are void as to purchasers for a valuable consideration having no notice thereof unless recorded within thirty days."

The Court held that a lease of all the timber on a tract of land for three years was a *conveyance* within the meaning of this statute, saying:

"If such an instrument is not required to be recorded, there is no law which requires that a lease of lands for a period of twenty years should be recorded. Such a construction would defeat the very purpose of the statute of registration. We are of the opinion that the agreement is within the letter and spirit of the statute, and must be recorded as against innocent purchasers. A lease is a conveyance or grant."

AUTHORITIES RELIED UPON BY DEFENDANT.

Nor can the decision herein be sustained by the authorities cited by defendant in error, on his brief below.

In *Edwards vs. Parker*, 7 Ore., 149, the statute provided:

"No covenant shall be implied in any conveyance of real estate."

A lessee having been evicted by the title paramount, brought an action for damages against his lessor upon an implied covenant for quiet enjoyment. It was argued that a lease being a conveyance of real estate, no covenant under the above statute could be implied. The Court held that, within the provisions of this *particular statute*, a lease was not a conveyance.

The judgment was eminently proper. Leases have ever been held to imply such covenants. No legislative intent to change the rule would be presumed in the absence of clear and unambiguous language. The Court properly held that the word as used in this statute was in its *technical and restricted sense* and referred only to *ordinary deeds of transfer*.

The same doctrine was announced by the Supreme Court of New York in *Tone vs. Brace, supra*, but in *Johnson vs. Stagg, supra*, it was held that "*conveyance*" comprehended *leases within the meaning of the recording acts*.

In *Branhall vs. Hutchinson* (N. J. Eq.), 7 Atl., 873, the question before the Court was as between the lien of a judgment and a prior recorded mortgage on the leasehold interest. The mortgage on the leasehold interest had been recorded as a *chattel mortgage* and not as a real estate mortgage. The Court said:

"The simple question here is whether a mortgage on a leasehold interest must be recorded as a *real estate mortgage*."

All the Court held was that, a mortgage on a leasehold interest was a *mortgage on a chattel*, and as such, was properly recorded.

It is true, that in the opinion the Court uses language indicative of a conclusion that the lease itself is not a conveyance of lands, but this question was not before the Court for determination. The Court held that, a mortgage of a leasehold was entitled to record, and being so recorded, took priority over the lien of the judgment.

If, however, the case could in any sense be considered as authority to the point that a lease for a term of years is not a conveyance of real property within the provisions of the recording acts, it may be considered as overruled in *State vs. Inhabitants*, *supra*, where the same Justice who delivered the opinion in *Branhall vs. Hutchinson*, Mr. Justice Van Syckle, held that a lease was a conveyance of lands. So, too, if so considered, the case is in direct conflict with *Spielmann vs. Kliet*, *supra*, where the precise point was considered and the Court held that the lease was a conveyance within the meaning of the recording acts.

Field vs. Howell, 6 Ga., 423, is direct authority against defendant in error. It was there held that, "when one buys land at a sheriff's sale upon which

“there is a lease from the defendant in execution older than the judgment, and at the time of the sale the *lessee has not entered into possession*, he (the purchaser), buys it *subject* to the right of entry and user under the lease.” The Court said:

“I comprehend that the idea upon which the plaintiff in error has acted in framing his pleadings is this, to wit: That Howell, not having possession, the sale under the judgment extinguished the lease, and that he bought an unincumbered title. This, however, is an error. *He bought the land encumbered with the lease*, for that was the interest and only that which the defendant in execution had. He bought no less and could buy no more than the estate in the land owned by him.”

Chapman vs. Gray, 15 Mass., 439, is also authority *directly against* defendant in error, for it was there held:

“A lease for years, although the term thereby granted be less than seven years, yet being made to commence at a future date, if it is to endure more than seven years from the making thereof, *is within the requirements of the statutes concerning the recording of deeds.*”

The Court said:

“The lease made by Parsons to the plaintiff being prior in date to the attachment, the execution of the defendants would have been de-

feated, if the lease had been duly acknowledged and *recorded, but not having been recorded*, it is clearly ineffectual as against the attachment made by the defendant. Although the term granted was less than seven years, yet the lease was to endure for more than seven years from the making thereof. *It comes within the words as well as within the manifest intent of the statute."*

Jefferson vs. Easton, 113 Cal., 345, is not remotely in point. That was a case where a lessee, whose original lessor had no title to the premises demised, sold his leasehold estate to a third person who was compelled to surrender to the true owner. The original lessee brought suit against his vendee for the purchase price of the leasehold estate. All that was held was that, a leasehold estate was a *chattel real* (something which has never been doubted), and is governed generally by the rules applicable to personal property; that though the rule of *caveat emptor* applies to the *quality* of the thing sold, yet upon *total breach of an implied warranty of title*, the purchaser may recover the purchase money paid, and has a good defense against an action by the seller.

All that was held in *Shipley vs. Smith*, 70 N. W., 804, was, that an infant who had executed a lease might disaffirm the same on becoming twenty-one years of age, such contracts being voidable. It was

said in the case that a lease of real estate was a *chattel real*.

All that was held in *Culbreth vs. Smith* (Md.), 16 Atl., 112, was that, a lease was a *chattel real*.

Nichol vs. Brown (Md.), 23 Atl., 636, is authority against defendant in error. The statute there provided, "*No estate of inheritance or freehold . . . or any estate above seven years shall pass or take effect unless the deed conveying the same shall be executed, acknowledged and recorded as herein provided.*" It was held that a leasehold interest for over seven years *was within the provisions of this statute*, and to bind the lessee to the payment of rent, *must be recorded*. The Court said:

"The faith and credit which the law intends to give to registration would be greatly weakened if at any moment there could be a legal title by deed which did *not appear upon the registration records.*"

The citations from Kent, if at all in point, would be fully answered by *Johnson vs. Stagg, supra*, where the Chief Justice held that *a lease for a term, was a conveyance of lands within the recording acts*.

This disposes of all the authorities cited by defendant in error on the brief below.

In conclusion of the discussion of this point it

may be well to say that it is a *peculiar and significant fact* that in all the mass of authorities, not a single case can be found in this country or England, holding that a lease for a term of years is not a conveyance of real property within the meaning of the recording acts, and that a lessee is not entitled to full protection against a prior, unacknowledged, unwitnessed, unrecorded and secret deed. No court, prior to the decision of this case, seems ever to have so held. Nor has any text writer stated such a rule.

ASSUMPTION THAT CONTRACTS ARE LEASES.

The reasoning upon which the decision of the Circuit Court of Appeals is based, is we think, erroneous in assuming that the contracts in question in this case are leases.

Though the first contract (Tr., 19) purports on its face to be a lease, it is in fact a grant of all the mineral in the ground which could be extracted from the date of its execution until the first day of June, 1908.

The second contract (Tr., 22) is not *even called a lease*. There are no words of demise; it is not for a term of years; it is a grant of the entire estate on certain percentages "*until the premises shall have been thoroughly and completely mined and worked out.*"

This is a base or qualified fee and in no sense a

lease. It is of indeterminate duration. *It might last an indefinite time or forever. How, then, can it be a lease?*

A placer claim is valuable only for the gold contained in its gravels. Except for this, it is worthless.

The amount of gold contained in a placer claim is a fixed, definite quantity. It can not be changed. If the claim contains \$100,000.00 gross and the portion reserved to the lessor be 25%, the lessor receives \$25,000 and the lessee \$75,000 of the gross. Their respective profits and interests are fixed, unchanged, unalterable quantities. Suppose the substance can be extracted in six months; after this the so-called lease is valueless; the property has been completely exhausted and *is worthless*.

In speaking of *mining leases*, Lord Cairns sitting in the House of Lords, in *Scotch & D. Appeals* (L. R.), 273, said:

“Although we speak of a mineral lease or a lease of mines, the contract is not in reality a lease at all in the sense in which we speak of an agricultural lease. There is no fruit, that is to say, there is no increase; there is no sowing or reaping in the ordinary sense of the terms, and there are no periodical harvests. What we call a mineral lease is really, where properly considered, a *sale out and out of a portion of the land*. It is liberty given to the particular individual for a specific length of time to go

into and under the land and to get certain things there if he can find them and to take them away *just as if he had bought so much of the soil.*"

In considering the same questions the Supreme Court of Pennsylvania said in *Consolidated Coal Co. vs. Peers*, 37 N. E., 938:

"The law, as we understand it is, that a lease of the right and privilege to mine or take away stone or coal from the lessor's land is the *grant of an interest in the land and not a mere license to take stone or coal.*"

In *Hope's Appeal*, 3 Atl., 23, it is said:

"The grant of a right to mine coal in the land of the lessor and to remove it therefrom, although the instrument *may be called a lease, is a grant of an interest in the land itself.*"

See also to the same effect:

Kingsley vs. Hillside, 144 Pa. St., 613; 33 Atl., 250.

In discussing this precise question, Mr. Curtis H. Lindley, the most eminent text writer upon mines and mining rights, says:

"A lease has been defined to be: 'A contract for the possession and profits of lands and tenements on the one side and a recompense of rent or other income on the other.'

"By the term 'rent' we mean: 'A return or compensation for the possession of some corporeal inheritance, a certain profit either in money, provisions or labor, issuing out of lands and tenements in return for their use.'

"We have already seen that mineral in place is land; that when it is taken therefrom and changed into personal property, real estate to that extent has been destroyed. It is obvious that the normal relation of landlord and tenant does not contemplate destruction of the estate by the tenant, and that such destruction can not properly be called 'use.' It is equally plain that the so-called 'rent' in a mining lease is something more than a return for the possession and use of real property. While the contract is *in name a lease, it amounts in fact to a sale*, and if it grant the right to take all the mineral it is a *sale of real estate*—the lessee's interest is a *fee in the mineral* and the lessor's so-called rent is *purchase money for real estate.*"

2 *Lindley*, Sec. 861.

In *Gowan vs. Christie*, 5 Moak, 114, it was said that a mining lease is practically *a sale of a portion of the land*, notwithstanding the instrument designates the parties as *lessor and lessee*.

To the same effect is,

Harlan vs. Lehigh Coal Co., 35 Pa. St., 287;

Delaware vs. Sanderson, 109 Pa. St., 583;

1 *Atl.*, 394;

Fairchild vs. Fairchild (Pa.), 12 Atl., 74;
Tilley vs. Moyers, 43 Pa. St., 404.

In *Hobart vs. Murray*, 54 Mo. App., 249, an agreement in writing purported, in consideration of stipulated royalties, to lease land for mining purposes only, and, subject to the limitation that the grantee's right should not be interfered with, reserved the right of occupation of the surface for the purpose of cultivation. It provided that it should remain in force until the mineral should be exhausted, but otherwise had no fixed term. It was here held that the agreement was not a lease since it had no determinate period, *but that it passed title to all minerals within the land, subject to the claim of the owner for royalties.*

In a very carefully considered case in the Circuit Court of Appeals for the 3rd Circuit, *Plummer vs. Hillside Coal & Iron Co.*, 104 Fed., 208, where an owner of land had leased it for a term with the privilege to the lessor of mining and extracting coal therefrom, it was held that the title to the underlying coal passed by this instrument to the lessee. The Court said:

"The lease contains words of present demise. It is not executory as claimed by the plaintiffs; it operated not only to work the severance of the surface of the land from the underlying coal, *but as a sale of the coal* with the right of removal within one hundred years."

In view of these authorities, and the underlying principles by which they are supported, it is indeed hard to conceive how the contract of June 20, "Exhibit B" (Tr., 22) could be considered otherwise than as an *outright grant of the mineral contained in the land.*

B.

But it is said that Waskey can in no event be considered an innocent purchaser for value and without notice, because he paid no consideration.

No authority is cited to sustain this position, and it is not easy to see upon what principle it is made to rest.

This Court has said in *Stanley vs. Schwalby*, 162 U. S., 255:

"A value consideration may be other than the actual payment of money and may consist of acts to be done after the conveyance."

There seems to be little reason in maintaining that, because the consideration expressed is for the payment of royalty and the expenditure of labor in the development of the property, that it is not a valuable consideration, or that because the lessee realized some profit out of the venture, therefore, by the expenditure of his labor and capital, he has not paid a valuable consideration for his interests.

If Waskey had simply agreed to pay the annual

rental for his grant, surely no one would have contended that this was not a valuable consideration. What matter if the purchase price for the minerals granted is a certain definite proportion thereof extracted by his labor, industry and capital?

Can it be possible that if A agrees to prospect a mine at his own expense, and in this connection spends his time and thousands of dollars, losing other opportunities in other mines, he is then entitled only to reimbursement for his actual expenditures? Suppose no pay had been discovered, what reimbursement would he receive?

In the California oil fields, the average cost of a well is estimated to be about thirty thousand dollars. *Is this no consideration for the grant of the minerals under a so-called lease?*

It will be observed that the foregoing argument keeps entirely out of view the fact that in the case at bar, not only did plaintiff in error agree to pay and deliver a certain *quantum* of the gross profit of the mine, but also at his own expense to develop the mine and locate the pay. *All these conditions he performed at the expense of his time, labor and several thousand dollars.*

The consideration of the interest herein conveyed was money and labor. The property was opened at the expense of the grantee and afterwards a royalty was to be paid to the grantors on

the gross amount of gold taken out. *If such a consideration is not valuable it is hard to conceive what is meant by this term.*

FURTHER CONSIDERATIONS.

It is earnestly submitted that in the stress laid upon a technical statutory construction, the *fundamental equities* of the respective parties have been lost sight of.

Suppose the lease and contract be deemed mere personal property; suppose the lease is not a conveyance and the leasehold estate not an interest in lands or real property entitling it to record under the registration acts, and therefore not within the purview of the language of the statute. *Has not an innocent purchaser of personalty as much protection as one of realty?* The decision assumes that an innocent purchaser of personalty is without protection. An innocent purchaser of personalty, we submit, *is entitled to as much protection as one of realty.* In this respect the decision is in direct conflict with all authority.

- 1 *Perry on Trusts*, Sec. 237;
- Woodson vs. Cole*, 69 Cal., 142;
- Kingsbury vs. Smith*, 13 N. H., 109;
- Woolridge vs. Thiele*, 17 S. W., 340;
- McNeil vs. National Bank*, 46 N. Y., 505;
- Dover vs. Pittsburg Oil Co.*, 143 Cal., 501.

Even if defendant in error be held *entirely guiltless* in his failure to record his deed and in permitting, for four years, the apparent title to remain of record in Whittren. Surely Waskey must be considered *equally without fault*. And it is a rule of universal application.

"Where one of two innocent parties must suffer it must be he who trusted the most, or he whose misplaced confidence enabled the wrong to be committed."

Ruiz vs. Norton, 4 Cal., 355;
 Blaisdell vs. Leach, 101 Cal., 405;
 Noble vs. Moses, 74 Ala., 604;
 Hill vs. Lowe (D. C.), 6 Mackey, 428;
 McClelland vs. Bartlett, 13 Ill. Ap., 236;
 Peake vs. Thomas, 39 Mich., 584;
 Baldwin vs. Richman, 9 N. Y. Eq., 394;
 Hertell vs. Bogert, 9 Paige (N. Y.), 52;
 Brooke vs. N. Y. Ry. Co., 108 Pa. St., 529;
 Coles vs. Anderson, 27 Tenn. (8 Humph.), 489.

Even if it be admitted *arguendo*, that the deed from Whittren to Chambers was properly recorded, though, as pointed out, *this can not be possible under the requirements of the Alaska statutes in view of its defective execution*, it does not yet follow that Chambers should be permitted to recover. For as has been frequently held, *the actual physical pos-*

session of Waskey was the equivalent of due recordation.

In *Landes vs. Brant*, 10 How., 348, this Court held that the fact that a sheriff's deed was not recorded, was of no consequence as between a party claiming under that deed, and the devisees of the original claimant where the former was in the open and notorious possession of the premises, the Court said:

"It is conclusively settled in England that open and notorious adverse possession is evidence of notice, not of the adverse holding only, *but of the title under which the possession is held.* And in the United States we deem it to be equally settled, nor are we aware that a contrary doctrine is held in any State in the Union."

In *Lea vs. Polk County, Etc.*, 21 How., 493, this Court held, that although a deed was not registered, adverse possession was in itself notice that the grantee held the land under a title, the character of which the complainant was bound to ascertain. The Court said:

"But it is insisted that the deed from Lea to Davis was not registered and fraudulently concealed from the plaintiff, so that he could not proceed to assert his rights. Davis had possession of the land when he took Lea's deed, claiming for himself and adversely to all others, and

he so continued in possession until he sold the land in December, 1852. *This adverse possession was in itself notice that he held the land under a title, the character of which the complainant was bound to ascertain."*

Thus under the first of these authorities, the actual possession of Waskey, even though his lease and contract had never been recorded, would have been good as *against the devisee or assignee of Chambers. Why not against Chambers himself?*

Though the second authority and other decisions of a similar nature deal primarily with subsequent purchasers, no distinction exists, *in principle at least*, between such a class and prior purchasers, where the contract has been made, a large part of the consideration paid, and possession taken and maintained, *all before the recordation or knowledge of the prior conveyance.*

V.

Upon the offer of the deed from Whittren to Chambers, its introduction in evidence was objected to upon the ground that it was not a conveyance under the statutes of Alaska. This objection was overruled (Tr., 50-51).

As the law of Alaska stood prior to the Act of June 6, 1900, a conveyance of the lands or any interest therein might be made by "deed signed and

sealed by the person from whom the estate or interest is intended to pass, etc.”

Congress, desiring to change this rule and provide greater and more efficient safeguards for the conveyance of real property, enacted *June 6th, 1900*, the following provisions:

Sec. 1046, Part IV:

“No estate or interest in real property other than a lease for a term not exceeding one year nor any trust or power concerning such property can be created, transferred or declared, otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring or declaring the same, or by his lawful agent under written authority, *and executed with such formalities as are required by law.*”

Sec. 73, Part V:

“A conveyance of lands or any estate or interest therein may be made by *deed* signed and sealed by the person from whom the estate or interest is intended to pass, being of *lawful age*, or by his lawful agent or attorney, *and acknowledged or proved and recorded as directed, without any other act or ceremony whatever.*”

Sec. 82, Part V:

“Deeds executed within the district of lands or any interest in lands therein *shall be executed in the presence of two witnesses who shall subscribe their names to the same as such.*”

Thus it appears:

(1) Under the old law, mere signing and sealing was sufficient;

(2) Under the new law, the instrument to convey legal title must be in writing, signed by the grantor and "*executed with such formalities as are required by law*";

(3) If the conveyance be by deed the grantor must be "*of lawful age, etc.*";

(4) If by deed it "*shall be executed in the presence of two witnesses who shall subscribe their names to the same as such.*"

Recognizing that the new rule, which it was then adopting might be construed to effect the validity of transfers *theretofore made* within the district, Congress provided by section 113:

"All deeds to real property heretofore executed in the District which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without *any other execution or acknowledgment whatever*, and such deeds so executed shall be received in evidence in all courts of the District, and be evidence of the title to the lands therein described against the grantors, their heirs and assigns."

When it is remember that under the old law *no attestation was required*; that this law was *deliberately changed by Congress*; it cannot properly be held that such attestation was unnecessary under the new law without *violence to the evident legislative intent*.

As said by Circuit Judge Ross in his dissenting opinion herein (Tr., 318) after quoting the sections of the Act, *curative of theretofore defective conveyances*:

"These are remedial sections, and the very fact that Congress thereby provided that all deeds theretofore made and acknowledged or approved in accordance with the laws of the District of Alaska in force at the time of such making and acknowledgment or proving should be received in evidence, notwithstanding the provisions of the Act of June 6, 1900, and that all deeds to real property theretofore made in Alaska by the mere signing by the grantor without any other execution should be deemed sufficient in law to convey the legal title to the premises therein described from the grantor to the grantee and be received in evidence, notwithstanding the provisions of the act of June 6, 1900, makes the conclusion *quite irresistible*, in my opinion, that its intention was that in respect to deeds executed *after the passage of that Act*, those *only* which conform to its provisions should be held to be valid conveyances of the legal title to the premises therein described, or receivable as evidences of such title."

And again:

"Perhaps one of the reasons for those provisions lies in the peculiar conditions existing in the extensive region of country with which it was dealing; the roaming character of its people, going into it with a rush in the spring and coming out with a rush in the fall, with many practical difficulties while there in the way of making their acknowledgment or proof of such instrument, but whatever the reason, *the courts have no power to dispense with the requirements by Congress that such an instrument shall be attested by two witnesses.* If so, they have the same power to hold that there may be *no attesting witnesses at all.*"

The reasoning upon which the "*majority opinion*" is made to rest is, that inasmuch as *Sec. 82*, providing for the attestation of two witnesses was borrowed from the Oregon Code, and inasmuch as it had theretofore been held in *Moore vs. Thomas*, 1 Ore., 201, that an unacknowledged, unrecorded mortgage was good between the parties, that therefore, in adopting this section from the Code of Oregon, Congress adopted the construction in the case last cited.

But this reasoning involves two errors: First, it assumes that an unacknowledged deed is an equivalent to an unattested one, though the statute makes no requirement for *acknowledgment* as part of the execution; and secondly, it leaves out of view the

fact that Congress *expressly changed* the old rule under which *no attestation was necessary*. The very obvious answer to the reasoning of the Court is, as pointed out by Judge Ross, *supra*: *If no change was intended, why the change in the statute?*

On account of the transient character of the population, the great temptation to frauds and perjuries by reason of the excessive values of the subject matter; the roving population of gold seekers—in Nome to-day, Fairbanks next week, South Africa or Australia thereafter, Congress saw fit to change the old law and to add thereto certain precautions and formalities not theretofore existing.

No one will deny that the change was *wise, expedient, and fully justified by the conditions of the country*.

That there is a diversity of opinion to be found in the adjudicated cases upon almost identical statutes, is admitted.

Thus, the Supreme Courts of Oregon, Wisconsin, Nebraska, Georgia, Texas, Kentucky, New Hampshire, Michigan and Minnesota have nullified the statute, holding that though two witnesses are required, *none are necessary*.

On the other hand, however, the Circuit Court of Appeals for the Eighth Circuit, and the Supreme Courts of Alabama, Ohio, Arizona, Connecticut, Rhode Island and South Carolina have sus-

tained the statute and given vitality to its *unambiguous terms*.

Thus, in *Hendon vs. White*, 52 Ala., 597, in construing a similar statute the Court said:

"These essentials must be observed, or the alienation is unauthorized and ineffectual. The purpose was to require as indispensable to an alienation of lands an authentication to the act partaking of the character of the conveyances by which it was done. As the title could only pass by writing, there must be witnesses to its execution subscribing in writing or an acknowledgment before an officer of the law authorized to take and certify. A safeguard against fraud, perjury and clandestine conveyances is thus provided. *Such safeguard is a necessity to the security of titles.*"

So, in *Lewis vs. Herrera* (Ariz.), 85 Pac., 245, under the Arizona statute requiring the acknowledgment of a deed of conveyance of real estate, the Court said:

"When it says that every deed and conveyance of real estate must be signed by the grantor and must be duly acknowledged . . . it is equivalent to saying that no deed unless executed as therein provided will operate to effect a conveyance of real estate."

So, in *Merwin vs. Camp*, 3 Conn., 35, the statute required a deed to be attested by two witnesses.

A deed was offered in evidence attested by one, and excluded because not properly witnessed. The Supreme Court of Connecticut, in upholding the action of the trial Court, said:

"The precise question for determination is whether a deed with one witness only is legally sufficient to transfer lands when tested by the requirements of the statute on this subject. All pretense of title then in the property on the part of the defendants fails from the incompetency of Bunse's deed, which constitutes an indispensable part of it."

To the same effect:

Watson vs. Wells, 5 Conn., 468;

Kenyon vs. Segar, 14 R. I., 49;

Alston vs. Thompson, Cheves (S. C.), 271;

Spanier vs. Devoe (La.), 27 So., 174.

In *Summers vs. White*, 71 Fed., 106, the Nebraska statute provided that every assignment for the benefit of creditors should be executed in the same manner as a conveyance of real estate. The statute with reference to the conveyance of real estate provided:

"Deeds of real estate . . . must be signed by the grantor . . . in the presence of at least one competent witness who shall subscribe his name as a witness thereto."

The instrument under consideration was an unwitnessed assignment for the benefit of creditors. The Circuit Court of Appeals for the Eighth Circuit, after reviewing all the Nebraska cases, said:

"We are of the opinion, therefore, that it is the established doctrine in the State of Nebraska that a deed to real estate must be *witnessed to convey a valid title.*"

But the precise question was decided by *this* Court in *Clark vs. Graham*, 6 Wheat, 577. Here the deed was attested by one witness. The Ohio statute, like that of Alaska, required two.

Ohio.

Alaska.

"That all deeds for the conveyance of lands, tenements and hereditaments situate, lying and being within this State shall be signed and sealed by the grantor in the presence of two witnesses who shall subscribe the said deed or conveyance attesting the acknowledgment of the signing and sealing thereof."

"Deeds executed within the district of lands or any interest in lands therein shall be executed in the presence of two witnesses who shall subscribe their names to the same as such."

These two statutes are identical. The cases arose in the same manner. In the case decided by *this Court* the point arose upon the offer of the deed in evidence. It was objected to upon the ground that being attested by only one witness it was not a conveyance under the laws of Ohio. This Court said, after quoting the statute, *supra*:

"Although there are no negative words in this clause declaring all deeds for the conveyance of lands executed in any other manner to be void, *yet this must be necessarily inferred from the clause, in the absence of all words indicating a different legislative intent*, and in point of fact, such is understood to be the uniform construction of the act in the courts of Ohio. The deed, then, in this case, not being executed according to the laws of the State, the evidence was properly rejected by the Circuit Court."

It would seem, then, until changed or modified, the Circuit Court of Appeals should be bound by this decision. For, as pointed out in *Lindeberg vs. Howard*, 146 Fed., 467, in reversing a case from Alaska, because the lower Court adopted a rule followed by State courts as opposed to the Federal rule:

"Our conclusion is that the court below erred in following the rule announced by the State courts instead of being guided *by the decisions of the Supreme Court of the United States.*"

In conclusion it is submitted that the case is one of peculiar hardship to Waskey, and it would seem unconscionable that Chambers should be permitted to prevail. The record discloses, without contradiction, that Chambers received his deed in 1902. He apparently did not think the instrument of sufficient value to record. He left the District of Alaska without the intention of returning. He made no provision for the management of the property, for its prospecting, for its development, or even for the continuation of his estate through the performance of the annual labor required by law. He remained away from Nome for four years, during all of which time the apparent title and ownership, stood of record in the grantors of plaintiff in error. These grantors were upon the ground, exercising acts of ownership, dominion and control. They were causing the annual assessment work to be performed each year.

Defendant in Error, Chambers, resided some twenty-three hundred miles from the property. Plaintiff in Error in good faith, without knowledge or means of knowledge, without notice, and for a valuable consideration dealt with those persons in Nome, in whom rested the apparent title and ownership of record, and who for the last four years had been exercising acts of ownership and control.

At a cost of many thousands of dollars, Plaintiff in Error prospected the property, discovered the

pay at a depth of some eighty feet through the frozen muck and shale, developed the premises as a workable mine, and proved the value—*all before he had any notice, knowledge or means of knowledge of the claim of Defendant in Error.*

When Plaintiff in Error was about to reap the fruits of his industry, courage and investment, defendant arrived with his unattested, unacknowledged, unrecorded, altered deed, alleged to have been made four years before, and ousted Plaintiff from the possession which it would seem *ought to have been rightfully his.*

For the foregoing reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Ninth Circuit should be reversed.

W. H. METSON,
ALBERT FINK,
Attorneys for Petitioner and
Plaintiff in Error.

No. 221

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1911.

FRANK H. WASKEY,
Petitioner,
 vs.
 J. J. CHAMBERS,
Respondent.

Office Supreme Court, U. S.
 FILED.

MAR 12 1912
 JAMES H. McKENNEY,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
 COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

ALBERT H. ELLIOT,
Attorney for Respondent.

GEORGE W. REA,
Of Counsel.

Filed this _____ day of March, 1912.

JAMES H. McKENNEY, *Clerk.*

By _____ *Deputy Clerk.*

6

Summary of Argument.

The deed executed by J. Potter Whittren in favor of J. J. Chambers, respondent, for an undivided one-half of the Bon Voyage Claim was valid between the parties, notwithstanding it was executed in the presence of only one witness who subscribed his name thereto.

Even though the deed from Whittren to respondent was not recorded until after the execution of the leases between Whittren and petitioner, still petitioner cannot claim the benefit of the doctrine of innocent purchaser for value without notice, because a lease for years is a chattel real or personal property and is not within the purview of the statute.

The verdict of the jury is binding on the appellate courts upon any question of fact concerning which there is a conflict of the evidence, and therefore on all questions as to the execution of the deed and changes made on the face of the instrument, since the evidence was clearly conflicting, in view of the verdict in favor of respondent it must be assumed that the deed transferred a half interest in the Bon Voyage from Whittren to respondent on the 23rd or 24th day of May, 1906.

Conclusion.

The respondent was entitled to judgment for a one-half interest in the Bon Voyage and one-half of the gross output of the mine less the cost and expense of mining.

Chronology of the Important Facts of the Case.

- 1900—June 3rd. Agreement between Chambers and Whittren.
- 1902—Jan. 1st. Whittren located.
- 1902—Apr. 21st. Deed, Whittren to Chambers, dated.
- 1904—Oct. 1st. Contract, between Eadie and Whittren.
- 1905—Sept. 24th. Deed, Whittren, one-half claim to Eadie.
- 1906—May 24th. Alleged written agreement of Chambers to convey to Whittren.
- 1906—May 24th. Deed to Chambers changed.
- 1906—June 11th. Lease west one-half Whittren and Eadie to Waskey (25% of gross) to June 1, 1908.
- 1906—June 20th. Lease east one-half Whittren and Eadie to Waskey and Eadie (2 years) (one-eighth to Waskey; one-eighth to Eadie; balance to Waskey and Eadie).
- 1906—June 20th. Conveyance, Whittren to Chambers recorded.
- 1906—July 20th. Deed, Whittren to Chambers, Vol. 163, p. 387.
- 1906—Aug. 22nd. Waskey lease recorded Vol. 164, p. 133.
- 1906—Aug. 30th. Second Waskey lease, east one-half recorded Vol. 164, p. 138.
- 1907—Sept. 3rd. Verdict, favor Chambers, one-half Bon Voyage and \$20,441.83 damages.
- 1907—Sept. 21st. Motion for new trial denied.

No. 221

In the Supreme Court
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OCTOBER TERM, 1911.

FRANK H. WASKEY,	}
<i>Petitioner,</i>	
vs.	
J. J. CHAMBERS,	
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

Statement of the Case.

The case at bar is brought before this Court on petition for writ of certiorari and the return thereto, the said writ being directed to the Circuit Court of Appeals of the United States for the Ninth Circuit. It appears from the transcript of record on file herein that this Court is asked to review the judgment of the said Circuit Court of Appeals, ren-

dered in an action wherein petitioner was plaintiff in error, the said judgment having been given on appeal by writ of error from the District Court of Alaska, Second Division. The original action was one of ejectment brought by respondent as plaintiff against petitioner and others as defendants, in the said District Court of Alaska. The purpose of the action was that plaintiff therein might obtain from defendants therein a judgment granting to plaintiff possession of an undivided one-half interest in and to the mining claim known and described as the Bon Voyage, being a claim located in the Cape Nome Recording District, Alaska. The case was tried by the Judge of the District Court, sitting with a jury, and the verdict of the jury was in favor of the plaintiff therein (respondent here) for a half interest in the Bon Voyage and the sum of twenty thousand four hundred and forty-one dollars and eighty-three (\$20,441.83) cents and after the motion for a new trial was denied, the said Court entered judgment in favor of plaintiff, and against all the defendants in pursuance of the verdict of the jury. From the said judgment a writ of error was sued out by defendants to the Circuit Court of Appeals for the Ninth Circuit. The case was again heard upon writ of error, and judgment was rendered by the Circuit Court of Appeals affirming the judgment of the District Court.

A review of the judgment of the Circuit Court of Appeals is now sought upon the following grounds set forth in the petition for writ of certiorari herein:

(1) That the decision at bar is in conflict with final judgments of other courts of appeal of the United States and various states.

(2) That the effect of the decision at bar is to nullify certain Alaska statutes affecting titles to many mining claims in Alaska of large value.

After the filing of the petition for writ of certiorari herein, March 5, 1910, this Court granted said petition and the return to said writ was filed herein May 17, 1910. The said return contains a full transcript of all the proceedings had in the case, including all the evidence submitted to the jury as set forth in a *bill of exceptions* which is a part of the transcript. The entire case is therefore before this Court, including the original judgment based on the verdict of the jury, the judgment of the Circuit Court of Appeals affirming said judgment with the Court's reasons therefor. Petitioner, Frank H. Waskey, who was a layman or lessee asserting rights under two leases from Whittren, and Whittren and Eadie respectively, is the sole petitioner herein praying that the said judgment be set aside. Respondent asks that the judgment be affirmed.

At the time of the filing of the petition for writ of certiorari herein, respondent, Chambers, made no appearance in opposition thereto and the application was granted. After respondent realized that his rights were placed in jeopardy by the issuance of the writ, he made a motion to dismiss the said

writ, which motion was by the Court denied. Counsel for respondent have assumed that the denial of said motion foreclosed the question of the jurisdiction of this Court over the cause of action set forth in the transcript at bar, and we shall therefore refrain from a discussion of the important question as to whether the record herein presents a proper case upon which the appellate jurisdiction of this Court should be exercised. If we are mistaken in the assumption which we have made, then we ask this Court to consider the serious question as to whether the judgment herein presents any federal question, or any real "conflict between two or more "courts of appeal or between courts of appeal "and the courts of a state" or any "nullification" of any of the statutes of Alaska. We submit that if this Court has jurisdiction of a case like the one at bar then it is difficult to think of a mining case coming from the Territory of Alaska, which might not be taken to this Court on appeal before the rights of the parties shall have been finally determined.

The Facts.

On January 1, 1902, Whittren located a mining claim in the Nome Recording District, Alaska, which he called the Bon Voyage. On April 21, 1902, he deeded an undivided three-quarters interest to J. J. Chambers, respondent herein. On the 23rd or 24th of May, 1906, the petitioner and respond-

ent by mutual agreement changed the face of said deed as to the interest conveyed from a three-quarters interest to a one-half interest. This change was made by the hand of grantor himself (petitioner) and acids were used in erasing the words. After the change was made, the deed was re-delivered by the grantor (petitioner) to the grantee (respondent) and remained in the possession of respondent until recorded June 20, 1906. A copy of the deed is set forth on pages 49 and 50 of the transcript, from which it appears that the acknowledgment bears date April 21, 1902, which is the date of the deed itself. It also appears from the deed that the notary public before whom the signature to the deed was acknowledged, acted as the only witness to the signing, sealing and delivery thereof.

On the 24th day of September, 1905, the said Whittren deeded to one Andrew Eadie, one of the plaintiffs in error below (but not a petitioner herein), a one-half interest in the said claim, which deed was recorded October 9, 1905.

On the 11th day of June, 1906, and before the recording of the Chambers' deed, Whittren, the grantor under the deed, and the said Eadie, leased to Waskey (petitioner) the west half of the claim upon a lay reserving as rental or royalty 35% of the gross output.

On the 20th day of June, 1906, the said Whittren and the said Andrew Eadie entered into another lease agreement with the said Waskey, under the

terms of which Waskey and Eadie were to work the east half of the claim, the division of the gross output to be one-eighth to Whittren, one-eighth to Eadie, and the remainder equally to be divided between Waskey and Eadie after deducting from said remainder all costs and expenses of mining and operation, "the expense of first locating pay, however, to be borne solely by said Waskey".

The deed from Whittren to Chambers (respondent) of the half interest in the claim was not recorded until July 20, 1906, while the Waskey lease of the western half of the claim was recorded August 22, 1906, and the Waskey-Eadie lease agreement of the eastern half of the claim was recorded August 30, 1906.

Since Whittren in May, 1906, had deeded to Chambers (respondent) an undivided one-half interest in the claim, and since on the 24th day of September, 1905, he had deeded to Eadie the other half of the claim, obviously Whittren owned no interest whatever in the claim at the time of the making of both of the Waskey leases. Chambers (respondent) was not a party to either of the leases and was not bound by their terms. He was clearly entitled to one-half the gold taken out of the claim by Waskey or Eadie, less the cost of mining.

The Law.

I.

THERE IS A SHARP CONFLICT OF THE EVIDENCE ON THE MOST IMPORTANT FACTS IN THE CASE, AND THE VERDICT OF THE JURY IN RESPONDENT'S FAVOR SHOULD THEREFORE NOT BE DISTURBED.

An examination of the bill of exceptions in the transcript at bar will show that every vital and essential fact necessary to the establishing of plaintiff's case was disputed. The quantum of the estate originally described in the deed, the handwriting of the changed portion of the deed, whether or not the deed was changed by mutual consent of the parties—these important facts were submitted to the jury after a long trial and the verdict of the jury was in favor of respondent. We must assume therefore, for the purposes of the argument before this Court, that the evidence of J. J. Chambers (respondent) as to the manner of the execution of the deed, was true.

Hart v. Hudson River Bridge Co., 80 N. Y. 622 (we quote from the opinion):

“When, from the circumstances shown, inferences are to be drawn which are not certain and uncontrovertible, and may be differently made by different minds, it is for the jury to make them; that is to say, when the process is to be had at a trial of ascertaining whether one fact had being from the existence of another fact, it is for the jury to go through with the process.”

3 Cyc., 313.

"A general verdict will be presumed to be right unless it clearly appears that a jury of reasonable men could not reasonably, upon the evidence, have returned the verdict in question."

3 Cyc., 314.

Notes: "The theory of the case which will support the verdict will, if possible, be presumed to have been the one held by the jury."

II.

AS BETWEEN THE GRANTOR AND GRANTEE OF A DEED TO REAL PROPERTY, IF THE DEED IS OTHERWISE PROPERLY EXECUTED, BUT HAS ONLY ONE WITNESS TO THE SIGNATURE OF THE GRANTOR, THE DEED IS VALID AND PASSES TITLE.

The facts upon which this proposition of law is predicated arise from the face of the deed itself between Whittren, grantor, and Chambers, grantee. An examination of the deed found on pages 49 and 50 of the transcript (plaintiff's exhibit No. 1) shows that it was "signed, sealed and delivered in the presence of F. E. Fuller".

Section 73 of Part V, Chapter II of the Civil Code of Alaska, reads as follows:

"A conveyance of lands, or of any estate or interest therein, may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved, and recorded as directed

in this chapter, without any other act or ceremony whatever."

It will be admitted, we think, that the evidence discloses beyond a doubt that the deed in the case at bar was signed and sealed by the person from whom the estate was intended to pass; that the grantor was of lawful age; and that the deed was acknowledged before F. E. Fuller, notary public, and recorded in Vol. 163 of deeds at page 387, Records of Nome, District of Alaska (Trans. p. 50).

There are two methods by which a deed may be properly certified or proved so as to entitle it to be recorded.

First. The deed may be acknowledged by the person executing the same.

Section 82, Chapter II, Part V, of the Civil Code of Alaska, reads as follows:

"Deeds executed within the District, of lands, or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such; and the persons executing such deeds may acknowledge the execution thereof before any Judge, Clerk of the District Court, Notary Public or Commissioner within the District, and the officer taking such acknowledgment shall endorse thereon a certificate of the acknowledgment thereof and the true date of making the same under his hand."

Section 88, Chapter II, Part V, of the Civil Code of Alaska, reads as follows:

"No acknowledgment of any conveyance having been executed shall be taken by any officer

unless he shall know or have satisfactory evidence that the persons making such acknowledgment is the individual described in and who executed such conveyance."

Section 94, Chapter II, Part V, of the Civil Code of Alaska, reads as follows:

"Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed by any of the officers before named may be read in evidence without further proof thereof, and shall be entitled to be recorded in the precinct in which the lands lie."

Second. Or the deed may be acknowledged by one of the subscribing witnesses thereto. Section 89, Carter's Code, reads as follows:

"Proof of the execution of any conveyance may be made before any officer authorized to take acknowledgment of deeds, and shall be made by a subscribing witness thereto, who shall state his own place of residence, and that he knew the person described in and who executed such conveyance; and such proof shall not be taken unless the officer is personally acquainted with such subscribing witness or has satisfactory evidence that he is the same person who was a subscribing witness to such instrument."

It will be observed that Section 73 (*supra*) prescribes the things necessary to be done to complete a conveyance of lands and also the things to be done in placing the instrument of conveyance on record.

The Alaska code was taken from the code of the State of Oregon and we can with advantage examine the Oregon statute upon this point and also the decisions construing the statute.

Section 7109 of the code of Oregon covering the point under discussion reads as follows:

"Deeds executed within this State, of lands or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same, as such, and the persons executing said deeds may acknowledge execution thereof before any Judge of the Supreme Court, County Judge, Justice of the Peace or Notary Public within the State, and the officer taking such acknowledgment shall endorse thereon a certificate of the acknowledgment thereof, and the true date of making the same under his hand."

Section 7109, Lord's Oregon Laws, Vol. III.

Moore v. Thomas et al., 1 Ore, 201 (we quote from page 202 of the opinion):

"Assuming, as we must, that these mortgages are unacknowledged and unrecorded in law, we think they are valid, as between the parties thereto, and may be enforced in this proceeding against Thomas. True, the invalidity of said mortgages seems to be a legitimate deduction from some of the provisions of the Act of 1849, under which they were made; but when we consider the whole of said Act, we think our conclusion is well founded, and fully effectuates the object of such legislation.

"When said mortgages were signed, sealed and delivered by Thomas to Moore, *they were certainly good at common law*, and there is no reason to suppose that the design of the registry act was to prevent the operation of a deed so made, or to prevent the parties thereto, as against each other; but the manifest and exclusive object of such act was to protect third persons from fraud or injury by means of prior secret conveyances. This view corresponds with

the judicial construction of the same statute in Iowa from which this was taken, and is simply sustained by other authorities."

Fleschner v. Sumpter, 6 Pac. Rep. (Ore. 1885) 506:

Syllabus. "An instrument of conveyance executed by man and wife is entitled to record, although all the formalities required in connection with the acknowledgment, are complete as to the man only."

It has been contended that the decisions of Michigan sustain the position of petitioner and the case of *Crane v. Reader*, 21 Mich. (1870) 24, was cited in the Court below in support of petitioner's contention. We have collected all the decisions of Michigan which we have been able to find upon the proposition and submit them herewith for the purpose of showing that the later and better doctrine in that state is that a deed is valid as between the parties even though it is witnessed by only one witness.

Goodenough et al. v. Warren et al., 10 Federal Cases, page 588, No. 5534; 5 Sawyer 494 (C. C. Dist. Ore. 494) (we quote from the opinion):

"Does the statute of Oregon change this rule? Section I of the Act relating to conveyances (Laws Oregon 515) declares that 'conveyances of lands, or of any estate or interest therein may be made by deed signed and sealed'; and although in the same section and sentence it is further provided that such deeds may be 'acknowledged or proved and recorded' as therein directed, yet it is not declared and

evidently was not intended to make either such acknowledgment, proof or record any part of the execution of such instrument. These acts are all subsequent to the execution of the deed, and are the appointed means by which constructive notice of its execution and contents may be given to all the world. But section 10 of the act aforesaid does declare, that 'deeds executed within this state, of lands or any interest in lands therein, shall be executed in the presence of two witnesses who shall subscribe their names to the same as such'; and while this provision may not make such attestation an essential part of the execution of the deed, yet it is probable that where the execution is controverted, it cannot be shown, if not so attested. It is not a part of the execution, but the means by which it must be proven if necessary. 2 Bl. Com. 307. And it may be also, that as an acknowledgment, before a proper officer, of the execution of a deed, has the same effect as proof of the same by the attesting witnesses, to authorize the deed to be admitted to record, that it should have the same effect as an attestation generally. A formal acknowledgment before a proper officer by a grantor in a deed that he executed it, is as safe and satisfactory evidence of the fact, as the testimony of any subscribing witnesses."

Dougherty v. Randall, 3 Mich. (1855) 581
(quoted from opinion at page 586):

"The statute under which the bond and mortgage in question were executed, although requiring two subscribing witnesses to a deed of conveyance of real estate for the purposes of *registry*, contains no provision under which a deed with only one subscribing witness thereto can be for that reason legally adjudged void, either at law or equity, as between the parties thereto, or when offered as evidence against the

grantor in a collateral suit or proceeding. At common law no such rule ever prevailed; nor can such a rule, in justice or equity, ever be established."

Crane v. Reader, 21 Mich. (1870) 24:

In this case the Court held that a certain ordinance of 1787 requiring the attestation of two witnesses, which was in substance re-enacted in 1820, was intended to supplant the common law for the territory of Michigan, and that since the law in force in that territory prior to the ordinance was the French law, under which deeds were required to be attested by witnesses, a deed without witnesses was void. We quote from the opinion at page 60:

"The ordinance of 1787 provided that, until otherwise declared, lands might be 'conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person being of full age in whom the estate may be, and *attested by two witnesses, provided*, such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after the proper magistrates, courts and registers shall be appointed for that purpose.'

"The law of 1820, which governed the deed in question, was the same, so far as the witnesses are concerned. We think that this statute was designed to cover the whole subject until further legislation, and it cannot be supposed that any common law was to prevail over it, even if there had been any such law in force when the ordinance became operative. * * * It has been held, and we think correctly, that under such statutes the witnesses are essential to the validity of the conveyance.

"*French v. French*, 3 N. H. 234;

"*Courcier v. Graham*, 1 Ham. 330;

"*Patterson v. Pease*, 5 Ham. 190;
 "*Merwin v. Camp*, 3 Conn. 35;
 "*Clark v. Graham*, 6 Wh. 577."

Price v. Haynes, 37 Mich. (1887) 487 (quoting from opinion, page 489):

"This conclusion is strengthened in this case by the fact that the assignment is not witnessed and acknowledged so as to entitle it to record as a conveyance of realty. No doubt the title might pass without these ceremonies * * *."

Baker v. Clark et al., 17 N. W. (Mich. 1883) 225 (quoting from opinion at pages 225 and 226):

"In this case, also, the evidence is not conclusive, but it is not necessary to pass upon it, as the mortgage without witnesses would have been good between the parties."

Fulton et ux. v. Priddy, 82 N. W. (Mich. 1900) 65:

The facts in this case are closely analogous to the facts in the case at bar. It appears that the deed in question was changed by an erasure after it had been executed and then it was re-delivered by the grantor. It was held that a change made upon the face of an executed and delivered deed with the consent of the grantor was valid, and we quote from opinion at pages 65 and 66 as follows:

"That a conveyance so made is valid and effectual to convey title * * *. The condition upon which the deed is to be delivered need not be in writing but may rest in parol or partly in writing and partly in parol. * * *"

But it is said the deed was not re-executed, and was not, as changed, witnessed or acknowledged. According to the testimony of Mr. Smith, however, the change was made in the presence of the grantor, by her direction, and the deed was again delivered to him. The delivery of the deed may always be shown by parol testimony. If it was competent, therefore, for the grantor to pass title to this land by a deed without witnesses, it would seem to follow that the re-delivery of the deed to Mr. Smith after the erasure would be effectual. 2 Am. Eng. Enc. Law (2nd Ed.) 217.

"It is strenuously insisted that under our statutes (Sec. 8962, Comp. Laws) witnesses are necessary. It is hardly profitable to discuss the question of whether the statute might be open to this construction, as this court, in an early day, dealt with the question, and in so doing established a rule of property which we would not, under any view, feel at liberty to depart from. Under the holdings referred to, a deed not witnessed is good between the parties.

"Dougherty v. Randall, 3 Mich. 581;

"Price v. Haynes, 37 Mich. 487;

"Baker v. Clark, 52 Mich. 22 (17 N. W. 225)."

Carpenter v. Carpenter et al., 85 N. W. (Mich. 1901) 576 (we quote from opinion at page 577):

"The defect in the execution of Miriams' deed was the absence of a second witness, the only witness being the notary who took the acknowledgment, and who also attested the signature under the words 'Signed, sealed and delivered in the presence of'. This deed was recorded after it came to the possession of John I. Carpenter and a certified copy was introduced in evidence, against defendants' objec-

tion; but it was subsequently stricken from the record and original deed was introduced. By striking the certified copy from the record, any error arising from its admission was cured. It is settled in this state that a deed without witnesses is effective to convey the land described in it." (Here follows citation of cases already cited.)

The case of *Meighen v. Strong*, 6 Minn. 111, was relied upon in the Court below by petitioner as sustaining his position so far as the law of Minnesota was concerned, but a further investigation shows that the doctrine of that case was entirely overthrown by later decisions in that state.

Morton v. Leland, 27 Minn. (1908) 378:

The Court says at page 378 of the opinion:

"That it was made and executed, is evidence that it was signed and sealed; in other words that it was a deed." No pass claps title to Payne, nothing more was necessary than its execution and delivery. For this purpose neither witnesses or acknowledgment were requested."

Conlan v. Grace, 30 N. W. (Minn. 1886) 881
(we cite from page 883):

"The fact that Kate Conlan was not a subscribing witness would not affect the validity of the deeds. It is *the signing and sealing* that constitute an instrument a deed (citing cases)."

Johnson v. Sandhoff, 14 N. W. (Minn. 1883)
889 (page 890):

"That the mortgage, although defective for want of a second witness, was not therefore

void, but was valid as against Haley and persons having notice like Fewer, Stewart and the plaintiff. *Morton vs. Leland*, 373 Minn. 35 [s. c. 6 N. W. Rep. 678], *Ross vs. Worthington*, 11 Minn. 438 (Gil. 323)."

Summers v. White, 71 Federal (C. C. A., 8th Circuit, 1895) 106:

We call particular attention to the fact that this case, decided by the Circuit Court of Appeals of the United States for the 8th Circuit, arose in the State of Nebraska. The controversy was between an assignee for the benefit of creditors, and attaching creditors not consenting to the assignment. It is obvious therefore that the case was not one arising between parties to a deed or their privies.

We quote from page 108 of the opinion:

"In view of the authorities, the conclusion seems to be inevitable, that under the statute of Nebraska, deeds purporting to convey real estate are invalid unless they are witnessed in the mode provided by the statute, and inasmuch as the assignment law of that state provides that voluntary assignments shall be executed in the manner in which a conveyance of real estate must be executed to entitle the same to be recorded, and inasmuch as it also declares that no assignment shall be valid unless the same shall be made in conformity to the terms of the act, the further conclusion would seem to follow that an assignment made in Nebraska, which is not witnessed, conveys no title, *as against an attaching creditor of the assignor.*" (Italics ours.)

The above case was strongly relied upon by petitioner in his petition for writ of certiorari herein,

as showing that there was a conflict of opinion between the Circuit Court of Appeals for the Eighth Circuit in which the above case was decided and the Circuit Court of Appeals for the Ninth Circuit, in which the case at bar was decided. We therefore cite a later case from Nebraska as showing that a broad distinction should be drawn between a deed void as to third parties and a deed void as between the parties.

Bentley v. Jun et al., 107 N. W. (Nebraska 1906) 865 (we quote from page 867):

"It is next urged that the deed from Mary A. Bentley to the plaintiff was void because not attested by a competent witness. As hereinbefore stated, the deed, when handed to Bentley, was not attested; but on the suggestion of the grantor, he affixed his name thereto as a witness. The title of the defendant Jun under his subsequent deed is not assailed in this action; and it is unnecessary to discuss the competency of the grantee's husband to attest the execution of the deed. The rule that as between the parties, * * * a deed is valid, although not witnessed, has been followed in many decisions of this Court.

"*Missouri Valley Land Co. vs. Bushnell*, 11 Nebraska 192, 8 N. W. 389;

"*Pearson vs. Davis*, 41 Nebraska 608, 59 N. W. 885;

"*Holmes vs. Hull*, 50 Nebraska 656, 70 N. W. 241;

"*Prout vs. Burke*, 51 Nebraska 24, 70 N. W. 512."

We have been referred to the cases of *Merwin v. Camp*, 3 Conn. (1819) 35 and *Coit v. Starkweather*,

8 Conn. (1830) 289. We call particular attention to the dates of these decisions. So far as the former case is concerned it should be noted that the greater part of the discussion was as to whether or not the instrument in the case was a deed or a mere transfer of property on the town books authorized by an Act of the State of Connecticut passed in 1660. The decision is a pure dictum on the question of the validity of the deed, which only had one witness, whereas twelve years prior to 1672, an Act had been passed requiring two witnesses to a deed. The decision seems to assume that if it be held that the instrument was in fact a deed then it was invalid, because only witnessed by one witness. We submit that the decision is pure dictum.

The facts in the latter case show that an attempt was made to have a deed declared invalid because an alteration had been made in the deed by inserting the word "Junior" after the deed had been executed and recorded. It was argued that it was a positive requirement of the law that all deeds should be attested by two witnesses and acknowledged before a magistrate and that therefore the changed deed had not been witnessed or acknowledged and was void.

The decision assumes that if the alterations were material, the deed would be fatally defective for the reasons stated, without a new attestation and acknowledgment, but the opinion says at page 292:

"But in my opinion the alteration is immaterial; and the deed is good. This is the only point of any importance."

We submit that this decision should not be authority on a point which was not considered or decided except in a very inferential and incidental way.

The New Hampshire statute is peculiar in that there is a specific prohibition which prevents any deed being valid unless signed by two witnesses.

Stone v. Ashley, 13 N. H. (1842) 38 (page 42 of the opinion):

"The first section of the Act of June 29, 1829, N. H. Laws 533 (Ed. of 1830), provides that a deed, signed by two or more witnesses, acknowledged and recorded, shall be valid to pass land, 'and no deed of bargain and sale, etc., shall be good and effectual in law to hold such land, etc., *unless* executed in manner aforesaid'. The section also enacts that no deed shall be effectual in law to hold such land against any person but the grantor and his heirs unless it be acknowledged and recorded.

"This section contains a negative clause, the absence of which in the Act of 1791 was considered by the Court in *French v. French* as indicating that the legislature did not intend to abolish the modes of conveyance which had been in common use. * * * The language of the statute authorizes and requires us to decide that it was the intention of the legislature to abolish all modes of conveying land by deed unless they should conform to this requisition."

We call particular attention to the wording of the statute in the above case, and in view of the specific prohibition of the statute, it is not strange to find

the cases in New Hampshire holding a deed invalid "unless executed in manner aforesaid".

Hastings v. Cutler, 24 N. H. 481 (from page 482 of the opinion) :

"The Statute of June 29, 1829, was in different terms, and expressly provided that no deed of any greater estate than a lease for seven years should be good and effectual to hold the lands, 'unless executed in manner aforesaid', that is, unless the deed were signed, sealed and witnessed by two witnesses, and then further provided that the deed should not operate except as against grantor and his heirs, unless it was also acknowledged and recorded."

We submit that this case reiterates the particular emphasis placed upon the New Hampshire statute in deciding previous cases.

Gage v. Gage, 30 N. H. 420 (1855) (quoted, page 424) :

"The defendant's right to two-thirds of the property was conveyed in 1831, by power of attorney from him, made in the same year, to which there was but one subscribing witness; and under the statute then in force, the statute of 1829, a conveyance made by deed with only one witness would not be good (*Stone vs. Ashley*, 13 N. H. Rep. 38) and according to the rule which we have stated, this power of attorney was not good."

It will be observed that this follows the doctrine of *Stone v. Ashley* and is based upon the same statute.

Robison v. Gray et al., 97 S. W. 347 (Ky. 1906) (page 348):

"The paper executed in 1847 by Duncan conveying to his daughter Malinda Brittin the land was not acknowledged by Duncan, nor was an acknowledgment necessary to its validity as between the parties."

Leinenkugel v. Kehl et al., 40 N. W. (Wis. 1888) 683 (at page 684):

"It appears that that deed was not 'witnessed' or acknowledged, though in due form, and sufficient in other respects, to convey the title to the grantee. The contention of the defendants is that a deed not properly witnessed and acknowledged was inoperative to pass the title, even as between the parties thereto, under the statute then existing. Was, then, that deed valid? This question is hardly an open one in this Court.

"In *Myrick vs. McMillan*, 13 Wis. 188 (decided in 1860), it was held that an acknowledgment of a deed by the grantor was not essential to pass the legal title as between the parties to the instrument. * * * Attestation and acknowledgment are formalities required by the statute to entitle the deed to be recorded, so as to operate as notice to subsequent purchasers but are not essential to transfer the title as between the parties. The reasons for this construction of the statute are stated in the decisions and need not be repeated. If the question were *res integra*, we think the same construction should be placed upon the statute. But to now hold, in view of our decisions upon the subject, that a deed must be witnessed and acknowledged to pass the title, would be revolutionary, and might do much mischief. There can be no doubt that the legislature may pre-

scribe the form and solemnities to be observed in a conveyance of realty within its limits; but the question always is, what requisites are made essential for that purpose in this state? That question will find its answer in the decisions above cited which we have no purpose to disturb, for we think they are in accord with the great weight of authority upon this subject."

Howard v. Russell, 30 S. E. Rep. 802 (Georgia 1898), 104 Georgia 230 (page 230):

"We think that, if Mrs. Murphy made a deed to Russell, which was attested by one witness only, it would have conveyed title to the grantee. While the code of this state requires such a paper to be attested by two witnesses, it does not declare that a deed attested by but one witness is void. The main object of the attestation by two witnesses is to comply with the registration laws of the state. A deed not attested by two witnesses is not properly admissible to record; still it is sufficient to bind the parties, their heirs or privies (citing cases)."

Menley v. Zeiler, 23 Texas 87 (page 93):

"There is only one other question in the case which need be noticed. It was objected, that the deed from Hoenig to Zeigler was inadmissible in evidence, inasmuch as it had no subscribing witness, and therefore could not be proved by a subscribing witness. The deed was acknowledged by Hoenig before notary public but had no subscribing witness. The deed was valid without subscribing witnesses, having been acknowledged by the grantor before an officer, authorized by law to take his acknowledgment and to certify the same."

McLain v. Canales, 25 S. W. (Tex. 1894) 29
(page 30):

"The propositions under this assignment are:

"*First*. That a valid conveyance of land must be subscribed before two credible witnesses, or be properly acknowledged, and it is not competent to prove its execution by the testimony of the grantee in lieu of the proof required by law; *second*, a deed to land, made without subscribing witnesses, or not acknowledged, if not absolutely void, can be established only in a direct proceeding against the grantor, and cannot be asserted collaterally. The propositions are not sound. A deed without witnesses or acknowledgment is sufficient to convey land, those formalities being requisite only with respect to registration and notice. Prior to 1858, when seals were abolished, an unsealed deed was held to pass only the equitable title, but it was not void as a conveyance. The deed before us was executed in 1870, and, defendant having been in possession under it, an equitable title is as available to her as the legal title. At the time of this trial there was no disqualification of a witness by reason of interest and the defendant was not incompetent to testify to the execution of the deed. We are of the opinion that whatever title passed by said deed was a legal title."

Stirman et al. v. Cravens et al., 29 Arkansas
(1874) 548:

Syllabus. "An instruction that the jury must disregard a deed under which the defendant was placed in possession and claimed title, unless they were satisfied that it had been executed in the presence of two witnesses or acknowledged before witnesses or a competent officer, was erroneous, for if the deed conveyed

no legal title, it conferred an equitable interest, under which he was entitled to hold the possession."

In this case the learned Court makes a study of the law covering the point in the various states as it stood at the time the decision was written. The conflict between the laws of New Hampshire as interpreted by the case of *French v. French*, 3 N. H. 334 and the laws of South Carolina as interpreted in *Alston v. Thompson*, 1 Cheves 271-272, is pointed out.

It is also shown that in the case of *Clark v. Graham*, 6 Wheatland 577

"the Supreme Court of the United States construed the Ohio statute as their own courts had, holding that want of attestation prevented title from passing."

It is also pointed out, however, that

"in Ohio under their statute, an unattested deed has been held to pass equitable title.

"*Courcier vs. Graham*, 1 Ham. 331;

"*Patterson vs. Pease*, 5 id. 190."

The learned Judge also says as follows:

"In *Wiswall vs. Ross*, 4 Port. (Ala.) 321, it is recognized without argument or comment, that a deed unattested passed no title; but as the deed in that case was decided valid under a subsequent statute of Alabama, the passing dicta of the Court in commenting, is dropped without consideration."

The learned Court says further

"in Kansas it has been held that an acknowledgment has no reference to proof of execution, simply title passes without it".

Gray v. Uhlich, 8 Kans. 112.

Held substantially the same way in

Stevens v. Hampton, 46 Mo. 404;

Bishop v. Schneider, id. 472;

Ryan v. Carr, id. 483.

Voorhies v. Presbyterian Church of Amsterdam, 17 Barbour 104 (N. Y.):

Syllabus. "A deed of real estate without a subscribing witness or acknowledgment is good, except as against a purchaser or incumbrancer."

Under statutes like the Alaska statute the authorities generally hold that an acknowledgment is a substitute for attesting witnesses. In support of this we cite *Sharp v. Orme*, 61 Ala. 261, and we quote from that case as follows:

"The acknowledgment and certificate in this case is merely a substitute for an attestation by a witness, the parties to the deed being able to write and having signed it. If it had been attested no more than the signature of the witness would have been necessary, no affirmation by him of his knowledge of the parties or of their identity or of their acknowledgment that, with knowledge of its contents, they voluntarily executed it, would be required. * * * The material fact is, that the grantors acknowledge the execution of the conveyance, with knowledge of its contents, and when even this can be fairly and reasonably spelled out from the certificate, the requisites of the statute are satisfied."

Belk v. Meagher, 3 Montana 65 (we quote from the opinion at page 529 of Vol. I Morrison's Mining Reports):

"The provisions of the statute when taken and construed together are not ambiguous or

uncertain. It is evident that the object and purpose of the certificate of acknowledgment and also of proof of the execution of a deed, as the statute contemplates, is to authorize the deed to be recorded. In the absence of a certificate, and there being no proof of the execution of the deed, the same cannot be recorded; but either a certificate of acknowledgment or proof of execution under the statute so authenticates the deed as to qualify it for record. And so when there is proof of acknowledgment and a certificate thereof annexed or attached to the conveyance, no witnesses are required, and the conveyance is entitled to be recorded. And when there is no certificate of acknowledgment, but proof of the execution of the deed can be made by the subscribing witnesses thereto in the manner provided by the statute, then the conveyance is also entitled to record. The object of the record of a deed, and hence of the certificate of acknowledgment and proof of the execution thereof, is to impart notice to third persons. And hence it follows that neither the certificate of acknowledgment nor the attestation of subscribing witnesses are necessary to the validity of a deed, as between the parties thereto, and in no case where there is proof of acknowledgment and certificate thereof annexed or attached to a deed, and the same has been admitted to record by virtue of such certificate, are subscribing witnesses to the validity of such deed as to third persons."

The case was appealed to the Supreme Court of the United States and there affirmed in 104 U. S. 279, but the particular question here under discussion does not seem to have been discussed and was excluded from consideration.

Attestation was no part of the execution of a deed at common law and as between the parties or their privies a deed was sufficient to convey title if (1) signed, (2) sealed and (3) delivered. (2 *Blackstone Com.* 307; *Dole v. Thurlow*, 12 Met. 164; *Hepburn v. Dubois*, 12 Pet. 345.)

Section 113 of the Civil Code of Alaska, Chapter II, Part V, reads as follows:

"All deeds to real property heretofore executed in the district which shall have been signed by the grantors in due form shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees without any other execution or acknowledgment whatever; and such deeds so executed shall be received in evidence in all courts in the district and be conclusive evidence of the title to the lands therein described against the grantors, their heirs and assigns."

This was a curative statute intended to cure the defects in execution of deeds made in Alaska prior to the adoption of the statute. As said by the learned Judge who wrote the opinion in the case at bar:

"It was the intention to make valid as between the parties unsealed deeds which lacked one of the essential requisites of a common law conveyance even as between the parties."

This brings us to the case of *Clark et al. v. Graham*, 6 Wheat 576, decided by this Court and arising in the State of Ohio under a statute of that State reading as follows:

"That all deeds for the conveyance of lands, tenements and hereditaments, situate, lying and

being within this State shall be signed and sealed by the grantor in the presence of two witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within this State shall be acknowledged by party or parties or proven by subscribing witnesses before a Judge of the Court of Common Pleas, or a Justice of the Peace in any County in this State."

It will be observed that the witnesses under the above statute not only witness the signing and sealing of the deed, but they also witness or attest the acknowledgment of the signing and sealing thereof. In other words the grantor must as in the case of a will acknowledge to the witnesses that he signed and sealed the instrument, and that it is his will. It is not sufficient apparently under the Ohio statute that the witness merely see the signing and sealing of the deed, but the grantor of the deed must acknowledge to the witnesses that he signed and sealed it, so that they may "attest the acknowledgment of "the signing and sealing thereof". Just as in most states the testator of a will must publish it as his will in the presence of the witnesses, so the grantor under the Ohio statute must acknowledge the signing and sealing of the deed to his witnesses. If we are correct in our analysis of the statute, then obviously the attestation of the witnesses becomes a part of the execution of the deed itself, and the absence of such attestation would be fatal. The absence of the signing of two witnesses to a will where such witnesses are required is fatal because the

publishing of the will to the witness and their signatures to the will is a part of the execution of the will itself. In the same way the acknowledgment to the witnesses of the signing and sealing of a deed, and the attestation of the witnesses to the instrument itself, is under the wording of the Ohio statute, a part of the execution of the deed itself.

Under the Alaska statute, no acknowledgment of the signing or sealing of a deed by the grantor is necessary. The witnesses may sign as such when a deed has been "executed" in their presence. The execution in their presence is complete without any act in which they take part, although they witness it. The witnessing of the deed is only incidental to the execution under the Alaska statute, while under the Ohio statute, the witnessing of the acknowledgment of the signing and sealing of the deed is the execution of the deed itself. In view of this analysis, we can well agree with the language of this Court in the case *supra*.

"It is perfectly clear that no title to lands can be acquired or passed except according to the laws of the states in which they are situated."

We are unable to find that the doctrine of *Clark v. Graham* has been followed in any of the states. South Carolina has a statute which makes registration necessary to the validity of a deed and the cases from that state furnish no precedents of value.

In *Stirman v. Cravens*, 29 Arkansas 548, the learned judge who wrote the opinion even as far back as 1874 in speaking of *Clark v. Graham*, says:

“The Supreme Court of the United States construed the Ohio statute as their own Courts as holding that want of attestation prevented title from passing ‘but’ in Ohio under their statute, an unattested deed has been held to pass equitable title.

“*Courcier v. Graham*, 1 Ham 331;

“*Patterson v. Pease*, 5 *id.* 190.”

We submit that unless it can be shown that this Court has followed *Clark v. Graham* or unless cases can be cited showing that other states have recently adopted the ruling, we should not consider this one case as presenting a good rule applicable to Alaska, especially in view of the interpretation of the law given by the highest Court of Oregon. It is very significant that no case of the last few years from any state has been cited in opposition to the well considered decisions to which we have called attention.

III.

THE OWNER OF A LEASEHOLD ESTATE IN REAL PROPERTY IS NOT WITHIN THE PURVIEW OF THE STATUTE OF FRAUDS BECAUSE HE IS NOT AN INNOCENT PURCHASER IN GOOD FAITH AND FOR A VALUABLE CONSIDERATION.

It is contended that the petitioners, Waskey and Eadie, were lessees under leases that were entered into on their part without any knowledge whatever as to the existence of the deed from Whittren to

respondent Chambers. It is also argued that the lessees went into possession of the mine and did a large amount of work and expended money without knowledge as to the existence of Chambers' unrecorded deed. Petitioner is therefore trying to invoke the doctrine of "innocent purchaser for value", in his favor. There are three insurmountable difficulties in the way of petitioner's contention; (a) The Chambers' deed was in fact recorded before the recording of the leases; (b) No value was paid for the leasehold estate before notice of Chambers' title and the money expended on the property was recovered back from the ground itself; (c) A lessee is not a purchaser at all within the purview of the statute.

(a)

The transcript shows that the first Waskey lease was recorded August 22, 1906, and the second Waskey and Eadie agreement of lease was recorded August 30, 1906 (Trans. pp. 122-124). The deed from Whittren to Chambers was recorded July 20, 1906 (Trans. p. 50). It is true that the evidence shows that the lessees under both of these leases went into possession of the claim before the recordation of the Chambers' deed. But if we concede for the sake of the argument that the leases were "conveyances of real property", then the failure to record the alleged conveyances until after the Chambers' deed was recorded would seem to place the lessees in a position of inferiority of right to Chambers, who

was at least diligent enough to record the evidence of his title first. We do not see how the lessees can advance their position by contending that they are entitled to seniority of right when the record shows that their status is one of obvious inferiority within the purview of the statute which they themselves invoke.

(b)

How can the lessees be considered as purchasers for a "valuable consideration"?

By the terms of both the Waskey leases, the lessees were to operate the mine and pay to the lessor a royalty equal to a percentage of the gross output of the mine. It is true that they expended a large sum of money in developing and operating the leased property, but the evidence shows that they have been reimbursed from the output of the mine itself. Can it be argued that the lessees are purchasers for a valuable consideration, when it appears that they received back all the consideration actually paid out? Can this contention be made for the purpose of qualifying the lessees to claim the benefits of a statute which exists for the purpose of protecting purchasers who would lose, if the claimant under an unrecorded instrument is allowed to establish his title? How can the lessees be defrauded by allowing Chambers to recover his estate when the lessees are permitted to be reimbursed under the judgment at bar for all their expenditures made on the property in ignorance of the Chambers' claim?

(c)

The lessees were not (1) *purchasers* nor (2) did they purchase *real property*, within the scope or legal effect of the statute which petitioner invokes.

The statute in question is Section 98 of Chapter II of the Code of Alaska and reads as follows:

"Every conveyance of real property within the district hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

(1) The lessees were not purchasers.

We mean that the lessees were not innocent purchasers in good faith and for a valuable consideration. We have shown that under the testimony at bar petitioner cannot have been such a purchaser as is contemplated by the statute.

(2) The lessees did not purchase real property and hence a lease is not a conveyance within the statute quoted.

While the word "conveyance" is not defined in the code of Alaska or in the laws of Oregon, from which the Alaska code was taken, we are not without definitions.

"CONVEYANCE. As defined by statute, every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be effected in law or equity,

except last wills and testaments, leases for a term not exceeding three years and executory contracts for the sale or purchase of lands. At common law, the term 'conveyance' has been defined to mean an instrument in writing by which property, or the title to property, is conveyed or transmitted from one person to another; a sale; a transfer; the act or the instrument by which property in real estate is transferred; the transfer of the title of land from one person or class of persons, to another, or by one person to another person; the deed which passes or conveys land from one man to another; an instrument which carries from one person to another person an interest in land; a contract under seal."

9 Cyc., 860.

The words "real property", however, are defined in Section 181, page 388, Carter's Code of Alaska, which reads as follows:

"The word 'issue' as used in this chapter, includes all the lawful lineal descendants of the ancestor; and the term 'real property', includes all lands, tenements and hereditaments, and rights thereto, and all interests therein, whether in fee simple or for the life of another. The term 'personal property' includes all goods and chattels, moneys, credits and effects of whatever nature not included in the term 'real property'."

The Supreme Court of Oregon has construed the particular section of the Oregon statute from which the above quoted section was taken in the case of *Edwards v. Perkins*, 7 Ore. 149.

We quote from the opinion at pages 155 and 156, as follows:

"We shall now consider the point made in the argument that the lease named in the complaint, being in writing and under seal, conveyed an interest in the land such as is described in title I of Chapter VI of the code and that the lease is a conveyance of an interest in the land to which there could be no implied covenants, as provided in section 6 of said title (Stat. 516).

"At common law a lease of land for a term of years was a chattel interest, and did not descend to the heir, but went to the administrator, and such is the case still, unless this rule has been changed by our statute.

"The statute provides for the conveyance of land by deed, and we think embraces only such conveyances as purport to convey a freehold estate such as may descend to the heirs, or is for the life of the grantee, and does not include leases, which are classed by the statute as personal property (Stat. p. 550, sec. 14). In this section of the statute the terms real estate and personal property are clearly defined in these words: 'The term real property includes all lands, tenements and hereditaments, and rights thereto, and all interests therein, whether in fee simple or for the life of another. The term personal property includes all goods, chattels, moneys, credits and effects of whatever nature not included in the term real property.' It will be seen by these definitions that the words real property are more comprehensive than the word land and the definition here given of real property is certainly more comprehensive than the word land as used in title I of Chapter VI of the code, on which respondents rely, and yet it excludes leases. We think it is very evident from these statutes regulating the con-

veyance and descent of real property that leases are not embraced in the words 'conveyance of land' as used in title I of Chapter VI and that the provision in section 6 of said title, that 'no covenant shall be implied in any conveyance of real estate', does not apply to leases.

"As to leases, we think there is an implied covenant that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease. (Rawle on Covenants, 215, 476, 477.)

"If the tenant is evicted by a person having a paramount title, he can have an action against his landlord for damages."

The Supreme Court of California has disposed of the matter in the same way (*Jeffers v. Easton et al.*, 113 Cal. 345. We quote from pages 352, 353 of the opinion):

"Neither do the rules which govern conveyances of real property apply to assignments of estates for years. A term for years is only personal property—a chattel real. 'An estate for life, even if it be per auter vie, is a freehold; but an estate for a thousand years is only a chattel, and reckoned part of the personal estate.' (2 Blackstone's Commentaries, 143, 385-87.) 'All leases for years are held by law to be of less value—perhaps it would be more proper to say of less dignity—than estates for life; estates for life being freeholds, and for years but chattels, and regarded as part of the personal estate, and cast upon the executor.' (1 Wood on Landlord and Tenant, 143; see, also, sec. 73, p. 149.) Under the common-law leasehold estates of the wife went to the husband as personal property. (Wood on Landlord and Tenant, 223.) In the revised statute of New York there was a provision that 'No covenant shall be implied in any conveyance of

real estate, whether such conveyance contain special provisions or not'; and the court of appeals of the state held that the language did not include a term for years because it is not real estate, and that in a grant of such term there is an implied covenant of quiet enjoyment not only against the grantor, but against others claiming by lawful title. (Mayor etc. v. Mabie, 13 N. Y. 151; 64 Am. Dec. 538.) The Court there say: 'Terms for years fall within the definition of personal property. They go to the executors like other chattels; and although they are denominated chattels real to distinguish them from mere movables, they are not, when speaking with legal accuracy, considered real estate'. The common law upon the subject has not been changed by our statutes. The provision of section 1113 of the Civil Code, that only certain enumerated covenants shall be implied in transfers of property, is expressly limited to a conveyance by which 'an estate of inheritance or fee simple is to be passed'; and by section 765 the common-law distinction between freehold estates and estates for years is followed, and it is declared that 'estates for years are chattels real'. The same distinction is to be found in section 14, and in sections 657 to 663 of the same code. There is a marked difference between things real and an interest or estate in things real. The nature of the thing itself, therefore, does not determine the character of any particular estate that may exist in it, whether personal or real, but the extent and duration of the estate.'" (2 Cooley's Blackstone, 15, note 1.)

Commercial Bank v. Pritchard, 126 Cal. 600

(we quote from the concurring opinion at page 606 as follows):

"McFARLAND, J., concurring.—I concur in the judgment; but the opinion of the commissioner

might, perhaps, be construed as holding, generally, that an estate for years in land is real property, which, of course, is not so. An estate for years is, in its nature, personal property—a chattel real; and it is subject for most purposes to the law which applies to personal property. (See *Jeffers v. Easton*, 113 Cal. 345, where the subject is discussed and our code division of property into real and personal is shown to be, substantially, that of the common law.)”

Summerville v. Stockton Milling Co., 142 Cal.

539 (we quote from page 539 of the opinion as follows):

“Estates less than freehold are divided into estates for years (*id.* 140), estates at will (*id.* 145) and estates at sufferance (*id.* 150). and yet notwithstanding these classifications, the same author declares that things personal include all chattels, and that chattels real constitute one species of personal property, and include, among other things, an estate for years, and that a ‘freehold alone’ is real estate (*id.* 386). This court had before it the question whether or not an estate for years was personal property in *Jeffers vs. Easton*, 113 Cal. 352. In that case the court say: ‘A term for years is only personal property—a chattel real. * * * The common law upon the subject has not been changed by our statutes. * * * By section 765 (Civ. Code) the common law distinction between freehold estates for years is followed, and it is declared that estates for years are chattels real. The same distinction is to be found in section 14 and in sections 657 to 663 of the same code.’ There is nothing in any of the foregoing statutory provisions evincing an intention to change the general rule that judgments of courts of record are not liens on estates for years.”

In *Gear on Landlord and Tenant*, Section 2, we find this language:

"A term for years goes as personal assets to the executor or an administrator of a lessee and does not descend as realty nor will it pass under a general devise of real estate. A lease for years is not a conveyance nor is the estate of the lessee subject to the lien of a judgment, but could be seized and sold as a chattel."

In support of the above statement the author cites numerous cases from Illinois, Indiana, Maryland, Mississippi, Ohio, New York, Oregon, Missouri, Pennsylvania, New Jersey, North Carolina, Iowa, Michigan and Massachusetts.

Taylor, Landlord and Tenant, page 59, Sec. 51:

"We have already noticed the material difference between leases for years and leases for life or lives, in that the latter confer a freehold, while the former, without respect to their periods of duration, amount to no more than a mere chattel interest."

Vattier v. Hinde, 32 U. S. p. 270, 8 L. ed. 675
(we quote from the opinion as follows):

"Whether he knew that a conveyance had been made to Thomas Doyle, Jr., or not is immaterial. He could acquire nothing. The principle caveat emptor is completely applicable. The rules respecting a purchaser without notice, are framed for the protection of him who purchases a legal estate and pays the purchase money, without knowledge of an outstanding equity. * * * They apply fully only to the purchaser of the legal estate. Even the pur-

chaser of an equity is bound to take notice of any prior equity."

"The recordation system is entirely a creation of statute law."

20 Am. & Eng. Encyc. of Law (old ed.), p. 554.

Unless, therefore, the lessees in the case at bar are protected by bringing themselves clearly within the law, they can claim no priority of interest in the mine as against an unrecorded deed.

We call attention to the fact that under the Alaska statute, the petitioner must not only show himself to be a subsequent purchaser but also a purchaser of the *same real property*. How can a leasehold claimant be a purchaser of real property under the decisions which hold so clearly that a leasehold is not real property but personal property? The Alaska statute was passed to protect purchasers of real property and not leasehold claimants. It was never intended that the rule of caveat emptor should be rendered inoperative as to those occupying the position of lessees, but they are bound to deal with the owners of the property or take the consequences.

It is significant that Section 98 of the Alaska code (*supra*) does not directly or indirectly include within its scope leases. Compare Section 1214 of the Civil Code of California, which reads as follows:

"Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or

mortgagee of the same property, or any part thereof in good faith and for a valuable consideration, whose conveyance is first duly recorded, as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

It will be noticed that leases other than for a period less than one year are clearly contemplated as within the purview of the law but the Alaska statute says "every conveyance of real property, etc." How can we consider leases as being within the purview of the act when they are expressly excluded by the statute itself?

IV.

THE ALTERATIONS AND CHANGES IN THE DEED AT BAR MUST, IN ACCORDANCE WITH THE FINDINGS OF THE JURY AND IN VIEW OF THE CONFLICT OF THE EVIDENCE, BE ASSUMED TO HAVE BEEN MADE BY THE GRANTOR'S OWN HAND AND THEREFORE THE VALIDITY OF THE DEED AS A CONVEYANCE CANNOT BE SERIOUSLY QUESTIONED.

It would be a technical principle of law indeed which would render void as between the parties a deed wherein the grantor had made alterations reducing the amount of estate granted with the consent and approval of the grantee. The testimony shows that the deed was changed by the grantor Whittren himself and that there was a re-delivery.

"J. Potter Whittren made the change in that instrument. I saw him make it. I know the handwriting in the words 'one-half', the words which are written in that instrument. That is

J. Potter Whittren's handwriting. I saw him write it. That much was made by Whittren in my presence, at the time I have testified to by mutual consent between Mr. Whittren and myself, and it was made on the 23rd or 24th of May, 1906. It was changed from three-quarter interest to a one-half interest. The deed originally called for three-fourth interest and it was changed at that time to one-half interest. The deed was re-delivered to me by Mr. Whittren after this change was made. He handed it to me and I have had it in my possession ever since, except when I sent it up to be recorded." (Trans. p. 56.)

Assuming that the statement here quoted is a correct account of what took place, there can be no doubt that the deed was valid and properly admitted in evidence.

"When alterations are made in a deed by consent the deed takes effect from the subsequent delivery and no new acknowledgment is necessary."

Webb v. Mullens, 78 Ala. 111.

From Sec. 1354, Vol. 2, *Jones on Real Property and Conveyances*, we quote the following language:

"The deed takes effect when it is delivered. There is no rule of law prescribing to the grantor the order in which the several acts necessary to complete it shall be performed. He may sign and seal a blank and fill it up afterwards, or he may fill the blank first then sign and seal, and if a deed once completed and delivered is surrendered for the purpose he may as well alter it over for the purpose of making a new deed as to use a new blank, and if, when a new deed is thus made by altering an old one,

it is again delivered with intent that it shall take effect and become operative as an instrument of conveyance, the law will give it such effect."

Bassett v. Bassett, 55 Me. 127:

"When the effect of the alteration is to limit or restrict the estate or property conveyed, and are made by the grantor, they take effect from the subsequent delivery of the deed, and a second acknowledgment is not necessary."

Sharp v. Orme, 61 Ala. 263.

"The title to the estate which was vested in the grantee by a genuine and valid conveyance remains in him, though he destroy or make void the deed itself by a forgery or by a voluntary cancelment of the conveyance which created title. When a person has become the legal owner of real estate he cannot transfer it or part with his title except in some of the forms prescribed by law. The grantee may destroy his deed but not his estate. He may deprive himself of his remedies upon the covenants, but not of his right to hold the property. This distinction has existed from the earliest time."

To the same effect is the case of *Wood v. Hilderbrand*, 46 Mo., 2 Am. Rep. 513.

Greenleaf on Evidence, Section 568;

Felton v. Riddy, (123 Mich.) 82 N. W. 65;

Bacon v. Hooker, (117 Mass.) 83 Am. Stat. Rep. 279.

In the last case we find the following language:

"In modern times at least it is considered that so far as a deed passes an estate and is not merely executory its executed effect is not disturbed by a subsequent alteration."

All modern authority is to the effect that a deed or other instrument under seal may be altered by consent of the party to be bound thereby. In support of this we cite the following authorities:

- Devlin on Deeds*, Vol. 1, Sec. 460 and note;
Speake v. U. S., 9 Cranch. 28;
King v. Bush, 36 Ill. 142;
Humphreys v. Guillow, 13 N. H. 385;
Collins v. McBeace, 13 Ind. 448;
Kennedy v. Lancaster County Bank, 18 P. A. St. 347;
Kilkelly v. Martin, 34 Wis. 531;
Stiles v. Probst, 69 Ill. 382;
Berry v. Haines, 4 Wheat. 17;
Martin v. Buffalo, 27 S. E. Rep. 995;
Coburn v. Webb, 56 Ind. 96;
Swift v. Barber, 28 Mich. 503;
Toomer v. Rutland, 57 Ala. 379;
North v. Hennebery, 44 Wis. 306;
Woodbury v. Alleghany and K. E. Co., 72 Fed. 375;
Greenleaf on Evidence, Vol. 1, Sec. 568A.

After title once passes the grantee cannot be divested of his title by any alteration or even the destruction of his title deed.

- Blewett v. Front St. R. R. Co.*, 49 Fed. 126;
Jones on Real Property Conveyances, Sec. 1259.

This seems to us too well settled to require any further citation of authority.

The law presumes that an alteration appearing upon the face of a deed or other instrument was made prior to the execution of the deed and the burden of overcoming this presumption is on the party attacking the instrument on account of the alteration.

- Jones on Real Property Conveyancing*, Secs. 1359, 1360, note 4;
Little v. Herndon, 10 Wall. 26;
Hagan v. Merchants & Bankers Insurance Co., 25 Am. St. Rep. 493;
Franklin v. Baker, 29 Am. St. Rep. 547;
Wilson v. Hayes, 4 L. R. A. 196;
Van Hood v. Simmons, 78 Am. Dec. 573;
North River Meadow Co. v. Shewsberry, 53 Am. Dec. 258.

In the dissenting opinion of Judge Ross in the case at bar, the entire discussion is directed to the point that the deed in question was void because not witnessed by two witnesses, and the case of *Alaska Exploration Company v. Northern Mining and Trading Company*, 152 Fed. 145, is cited as though it were in point. That case holds, as we read it, that a deed improperly recorded is no notice to third persons who are subsequent purchasers of the same real property. Even though the deed at bar was not properly witnessed we do not understand that it is claimed that it is not properly *acknowledged*. If it is properly acknowledged, it would be entitled to registry even though defectively wit-

nessed. We do not understand that the recorder could be called upon to pass judicially upon the question of the proper execution of a deed. His inquiry is confined to ascertaining whether or not the deed is properly acknowledged. If it is acknowledged by the grantor himself that suffices, or if it is acknowledged by one of the witnesses, that will entitle it to be recorded.

It was vigorously contended at the trial of the case that the deed was improperly executed and hence invalid. It was also suggested that it was not properly witnessed and hence not entitled to registration and hence could not have been notice to the lessees. The question of law involved has already been fully discussed. The question of fact is settled by the verdict of the jury, and we fail to see that the case cited by the learned Judge who wrote the dissenting opinion has any bearing except upon the assumption that we are going to set aside the verdict of the jury and find upon the evidence that the deed was not properly executed in the first place and therefore, not entitled to be recorded.

V.

THE RECORD SHOWS THAT THE DEFENSE OF ESTOPPEL WAS STRICKEN OUT OF PETITIONER'S ANSWER TO THE SECOND AMENDED COMPLAINT IN THE LOWER COURT AND NO ERROR WAS ASSIGNED TO THE RULING OF THE SAID COURT.

Respondent on appeal to the Circuit Court of Appeals was surprised to hear it contended that re-

spondent had admitted the facts constituting the alleged estoppel, by failure to deny them in the pleadings. An investigation disclosed the fact that the record on appeal failed to show that the said portion of the pleading had in fact been stricken out. This defect was supplied by procuring a certificate of John H. Drum, clerk of the United States District Court of Alaska, and this certificate is set forth in full on page 320 of the transcript.

Conclusion.

Some other questions are discussed by petitioner in his petition for writ of certiorari herein, and various objections are made to the instructions given to the jury by the trial Court. We believe, however, that these points are not of importance and that the judgment at bar should be affirmed.

Respectfully submitted,

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